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In The
Supreme Court of the United States

LESPIA KING,

Petitioner,

JENNIFER DONOVAN, MALINDA BLAND, KRISTIN DARNELL, TAMARA SPEIGHT, ERIN BACHINSKY, and ANGELA LINKOUS,

Intervenors,

v.

GEORGE M. MCMILLAN, SHERIFF, and ROANOKE CITY SHERIFF'S OFFICE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

I. To resolve a split among the courts of appeals, whether the single-filing rule should apply to intervention in Title VII sexual harassment, hostile work environment claims.

II. To resolve a split among the courts of appeals, whether the plain language of Rule 24 of the Federal Rules of Civil Procedure permits intervention by a single intervenor in Title VII sexual harassment, hostile work environment claims.

PARTIES TO THE PROCEEDING

All parties to the proceeding in the court whose judgment is sought to be reviewed are included in the caption of the case.

Neither plaintiff-appellant nor intervenors are nongovernmental corporations, and therefore, no corporate disclosure statement is required pursuant to Rule 29.4 of the Rules of United State Supreme Court. The corporate disclosure statement of plaintiff-appellant, previously-filed with the court of appeals is included in the Appendix.

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STATEMENT OF BASIS FOR JURISDICTION IN THIS COURT

The Fourth Circuit Court of Appeals entered the order upon which review is sought on May 4, 2007. Subsequently, the Fourth Circuit denied plaintiff-appellant's and intervenors' timely motion for rehearing and rehearing *en banc*, by order dated May 30, 2007.

This Petition for Writ of Certiorari has been filed less than 90 days from the order denying the motion for rehearing and rehearing *en banc*, in accordance with Rule 13 of the Rules of the United States Supreme Court. Therefore, this Court has jurisdiction to review this matter by Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULES AT ISSUE IN THE PETITION

I. 42 U.S.C. § 2000e-5(e)

> Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or

local agency; seniority system (1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

II. Federal Rule of Civil Procedure 24(a) and (b).

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute

of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

STATEMENT OF THE CASE

I. Basis of Federal Jurisdiction in the Court of First Instance

The United States District Court for the Western District of Virginia had jurisdiction over this matter pursuant to 42 U.S.C. § 2000e and 28 U.S.C. § 1343(4).

II. Facts Material to Consideration of the Questions Presented

Defendant George M. McMillan, as Sheriff of the City of Roanoke (Virginia) employed Lespia J. King from August 2000 until March 2004. Soon after her employment began and continuing until her resignation, Sheriff McMillan sexually harassed King and maintained a hostile work environment in his office. The harassment and hostile work environment endured by King included: Sheriff McMillan (1) touching King about her waist and hips when he insisted on "helping" her strap on and adjust a gun belt during firearms training; (2) hugging and pulling King toward him on numerous occasions when he encountered her around the office, and while embracing her sliding his hands toward, and allowing them to linger near her buttocks; (3) isolating King in his office and then asking her questions about her personal and romantic life, inviting her to sit on his lap and requesting a kiss from her; (4) grabbing King by her hips and buttocks and hugging her at a social function attended by Sheriff's Office personnel; and, finally (5) isolating

King in the jail conference room, forcing King to kiss and hug him and pulling King onto his lap, while again questioning her about her personal and romantic life. On multiple occasions McMillan implied to King that she could "go places," and have a "wonderful career," if she would break up with her boyfriend and "put in her time." King resigned her employment after the incident in the jail conference room.

After King resigned her position with the Sheriff, she timely filed a Charge of Discrimination with the Equal Opportunity Employment Commission. *See Charge of Discrimination, included in the Appendix.* The EEOC issued a right to sue letter on June 8, 2005. *See Notice of Right to Sue letter, dated June 8, 2005, included in the Appendix.* She filed her Complaint, alleging a Title VII claim pursuant to 42 U.S.C. § 2000e, with the United States District Court for the Western District of Virginia on August 16, 2005. *See Complaint, included in the Appendix.*

Soon thereafter, King moved to certify the case as a class action. *See Motion to Certify Class Action, included in the Appendix.* While class certification was pending, the intervenors filed a motion for intervention pursuant to Fed. R. Civ. Pr. 24. *See Motion to Intervene, included in the Appendix.* Each intervenor raised claims substantially similar to those of King based upon facts similar to those alleged by King. Each intervenor alleged acts that occurred during the period in which King alleged that McMillan sexually harassed her and maintained a hostile work

environment, between August 2000 and March 2004, with the exception of Malinda Bland who alleged acts that occurred after King's term of employment but within King's statutory period to file her EEOC charge.

Jennifer Donovan worked as the Sheriff's public information officer from January to October 2002. Sheriff McMillan's harassment of Donovan began during her initial interview. McMillan isolated Donovan in his office for several hours during the interview and told her that as his public information officer she would be "like his mistress," that they would be best friends and closer than spouses and asked whether her husband was the jealous type. During her employment McMillan frequently touched Donovan about her body in ways that made her uncomfortable, including her lower back and brushing his fingers across her breast while touching her upper arm. In Donovan's presence the Sheriff commented that he did not hire one woman who applied for the position of public information officer even though she had "bigger tits" than Donovan, and on another occasion that his son was being fitted for an athletic cup and made reference to penis size. Donovan complained about the Sheriff's behavior, but he said she was being unreasonable. After she complained, however, McMillan became critical of her performance, began excluding Donovan from meetings and told her that he "may not keep her." Donovan resigned soon thereafter.

Kristan Darnell worked for Sheriff McMillan on two occasions during King's tenure, from January

to April 2001 and from January to August 2002. Darnell was only 18 years old when she first worked for the Sheriff. When McMillan interviewed Darnell he made a point of telling her that she would be among the first 18-year-olds that he had hired, and that he was a very "touchy, feely person [and that if she] enjoyed that [then maybe they could] end up having sex." Sheriff McMillan offered Darnell a well-paying job – considering her qualifications, and consequently, Darnell took the job. During Darnell's employment the Sheriff frequently hugged her and patted her on the buttocks. McMillan also commented that Darnell was pretty and that someday she would make some man very happy and that he wished it was him. Darnell left the Sheriff's office in April 2001 to move to Florida.

Darnell returned to Roanoke in January 2002 and spoke to the Sheriff about getting her job back. McMillan made it clear to Darnell that he would be doing her a favor by giving her job back, and that he did not do that for a lot of people but that she was very special. The harassing behavior of McMillan began again upon her re-employment. The Sheriff frequently requested that Darnell come into his office, hugged her and patted her on the buttocks, and on one occasion, after scolding her for not wearing a gun in public told her that she could make up for it by giving him a hug or by sleeping with him. Darnell searched for a comparably-paying job and left the Sheriff's employ as soon as she found one due to the hostile environment created by the Sheriff's behavior.

Malinda Bland endured Sheriff McMillan's treatment for a week in August 2004, a period that fell within King's 300 days to file her EEOC charge. Sheriff McMillan's sexually harassing behavior toward Bland began during her interview, too. As with the others, during her interview Sheriff McMillan isolated Bland in his office, commented on various aspects of her body, and put his hand on her leg. Bland accepted the position because she would receive a substantial pay increase from her current job. After hiring her, the Sheriff frequently grabbed her buttocks or the side of her body and pulled her onto his lap. McMillan continued to comment on her body parts as well, telling Bland that she had a "nice butt," and that he liked big breasts. On one occasion, McMillan came into the women's locker area, slid a $100 bill into the pocket of Bland's pants and said, "I take care of my girls," and inferred that he would provide her more money "as long as you ... let me feel you up from time to time." Later that same day, Sheriff McMillan told Bland that a previous female employee had filed a grievance against him but it went nowhere because, "I am the Sheriff. I am god." After that, Bland never returned to work at the Sheriff's office.

Angela Linkous worked for Prison Health Systems as a nurse dedicated to the Roanoke City Sheriff from approximately August 2001 to February 2003. Prison Health Systems is an independent contractor to the Sheriff. During her tenure Sheriff McMillan made inappropriate sexual remarks to Linkous and offered to buy her a new desk if she would go out on a date with him. Describing actions

similar to those described by the plaintiff and other intervenors, Linkous said the Sheriff hugged her and pulled her toward him on many occasions, and otherwise touched her in ways that made her feel uncomfortable. By February 2003, the hostile work environment became so severe that Linkous resigned.

Erin Bachinsky applied for the position of public information officer for Sheriff McMillan in 2002 while a graduate student at Radford University. Sheriff McMillan scheduled an interview with Bachinksy, but did not begin the interview until near closing time for his office, when everyone else was leaving. Like the others, McMillan met with Bachinsky alone. Far from questioning her about her qualifications for the job, McMillan asked Bachinsky about her personal and romantic life. Like Jennifer Donovan, the Sheriff described the position of public information officer as one who would be like his mistress, and stated that she would have to pack her bathing suit when they went on business trips together. At the conclusion of the interview Bachinsky rose and attempted to shake the Sheriff's hand to leave; instead Sheriff McMillan hugged her and patted her on the shoulder. Bachinsky reported the Sheriff's behavior to her family, friends and professors.

Tamara Speight worked for Prison Health Systems as a medic dedicated to the Sheriff from June 2000 to October 2001. Speight found herself in the unfortunate position of being alone in an elevator at the jail with Sheriff McMillan. McMillan

stared at her chest and said, "I bet you drive my inmates wild with that perky chest of yours." Speight resigned.

Despite the substantially similar nature of the intervenors' claims to those of King and the claims arising during the period that King alleged her sexual harassment and hostile work environment occurred, the district court denied the motion to certify as a class action,[1] and denied the motion to intervene. *See Order and Memorandum Opinion denying motion to intervene, included in the Appendix.* The denial of a motion to intervene is a final order as to the prospective intervenors, and appellate jurisdiction is conferred by 28 U.S.C. § 1291. Plaintiff and intervenors timely filed a notice of appeal to the Fourth Circuit Court of Appeals on January 31, 2006. *See Notice of Appeal, included in the Appendix.* The Fourth Circuit panel affirmed the judgment of the district court. *See Order and Opinion (per curiam) affirming the district court's denial, included in he Appendix.* King and the intervenors timely moved for rehearing and rehearing *en banc*,[2] which were denied by order date May 30, 2007. *See Order denying motion for re-hearing and re-hearing en banc, included in the Appendix.* This petition follows.

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[1] *See Order and Memorandum Opinion denying motion to certify class, included in the Appendix.*

[2] *See Motion for Re-Hearing and Re-Hearing En Banc, included in the Appendix.*

ARGUMENT

I. THE SINGLE-FILING RULE SHOULD APPLY TO INTERVENTION IN TITLE VII SEXUAL HARASSMENT, HOSTILE WORK ENVIRONMENT CLAIMS.

While the single-filing rule has existed for nearly half a century, it appears that the issue of whether the rule applies to intervention in sexual harassment, hostile work environment claims is a matter of first impression to the Court. The history and development of the single-filing rule weigh in favor of applying it in such circumstances, and plaintiff-appellant and intervenors hereby urge its adoption by the Court.

The single-filing rule provides that "[i]n a multi-plaintiff, non class action suit, if one plaintiff has filed a timely EEOC complaint as to that plaintiff's individual claim, then co-plaintiffs with individual claims arising out of similar discriminatory treatment in the same time frame need not have satisfied the filing requirement." *Ezell v. Mobile Housing Board*, 709 F.2d 1376, 1381 (11th Cir. 1983), *quoting Allen v. United States Steel Corp.*, 665 F.2d 689, 695 (5th Cir. Unit B 1982). The courts first applied the single-filing rule in the context of class actions. *Allen v. Amalgamated Transit Union Local 788*, 554 F.2d 876, 882 (8th Cir.), *cert. den'd*, 434 U.S. 891, 98 S.Ct. 266, 54 L.Ed.2d 176 (1977). The basis for the rule is succinctly set forth by the Fifth Circuit in *Oatis v. Crown Zellerbach*: "If it is impossible to reach a settlement with one discriminatee, what reason

would there be to assume that the next one would be successful." *Oatis v. Crown Zellerbach*, 398 F.2d 496, 498 (5th Cir. 1968).

Reasoning that the basis for application of the rule in the class action context applies equally to any multi-plaintiff action, courts have applied the rule outside of the class action context. *Snell v. Suffolk*, 782 F.2d 1094, 1100, n.8 (2d Cir. 1986). *See also*, *Howlett v. Holiday Inns*, 49 F.3d 189, 194 (6th Cir. 1995) ("It is uncontroversial that the single filing rule is not limited to class actions but also can permit a plaintiff to join individual ... actions if the named plaintiff filed a timely administrative charge." *Id.*, *internal quotations omitted*, *citing Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1057 (2d Cir. 1990). *See also*, *Amalgamated Transit*, 554 F.2d at 882-83.

> In the instant case, although no class action was filed, additional plaintiffs alleged facts demonstrating they were similarly situated and had received the same discriminatory treatment [as the plaintiffs who had filed EEOC charges]. Under such circumstances, it would be nonsensical to require each of the plaintiffs to individually file administrative charges with the EEOC.

Amalgamated Transit, *supra*. Every court of appeals to have considered the question has applied the single-filing rule in the non-class action context, save one. *See EEOC v. Wilson Metal Casket Co.*, 24 F.3d 836, 840 (6th Cir. 1994); *Lusardi v. Lechner*, 855

F.2d 1062 (3d Cir.), *cert. den'd*, 111 S.Ct. 1641 (1991); *Anderson v. Montgomery Ward*, 852 F.2d 1007 (7th Cir. 1988); *Snell*, *supra*; *Ezell*, *supra*; *DeMedina v. Reinhart*, 686 F.2d 997 (D.C. Cir. 1982); *Crawford v. United States Steel*, 660 F.2d 663 (5th Cir. 1981); *Mistretta v. Sandia Corp.*, 639 F.2d 588 (10th Cir. 1980); *Bean v. Crocker*, 600 F.2d 754 (9th Cir. 1979); and *Amalgamated Transit*, *supra*; *but see Whalen v. W.R. Grace & Co.*, 56 F.3d 504 (3d Cir. 1995).

To hold that the single-filing rule does not apply outside of the class action context "would frustrate the Congressional purpose expressed in Title VII [because it would create] a rule which produced different results for discriminatory practices in situations governed by the same policy." *Wheeler v. American Home Products Corp.*, 563 F.2d 1233, 1239 (5th Cir. 1977), *citing Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 2371, 45 L.Ed.2d 280 (1975). In emphasizing the "remedial purpose of the legislation," this Court has previously-held that not all plaintiffs must file a timely EEOC charge in Title VII cases. *Zipes v. TWA*, 455 U.S. 385, 393, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982). In *Zipes*, this Court held that "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel and equitable limitations." *Id.* The Court reasoned that such a rendering of the filing requirement "honor[s] the remedial purpose of the legislation as a whole without negating the particular purpose of the filing

requirement, to give prompt notice to the employer." *Id.*, 455 U.S. at 398.

The single-filing rule has been applied to hostile work environment claims. *See Wilson Metal*, *supra*, and *Snell*, *supra*. In *Snell*, some plaintiffs had filed EEOC charges and others had not. *Id.* at 1097. Finding that "[a]ll these incidents were of a similar nature and occurred at the [same facility] within a three-year period," the court adopted the single-filing rule. *Id.* at 1101. In *Wilson Metal* two plaintiffs, a husband and wife, who worked for the employer filed EEOC charges alleging Title VII violations by Wilson's owner. *Wilson Metal*, 24 F.3d at 839. The charges alleged sexual harassment against only the wife in 1982, and retaliatory discharge against both plaintiffs in 1984. *Id.* The federal district court granted relief in the case to another female employee, McMullen, discovered by the EEOC investigation, who was sexually harassed by Wilson's owner in 1987. *Id.* Wilson argued on appeal that McMullen should not have been granted relief because she failed to file an EEOC charge and her claim did not arise during the same time period. *Id.* The Sixth Circuit disagreed and affirmed the grant of relief to McMullen. *Id.* at 838. Specifically, the court found that "[b]ecause the practice of sexual harassment in this case continued over a three year period, the claims arose during the same time period." *Id.* at 840.

Applying the rule in the context of intervention is not new, either. *See Ezell*, *supra*; *Wheeler*, *supra*; *DeMedina*, *supra*; and *Foster v. Gueory*, 655 F.2d 1319 (D.C. Cir. 1981). In *Foster*,

three intervenors were added to a suit commenced by four original plaintiffs. *Foster*, 655 F.2d at 1321. Only one of the original plaintiffs had filed an EEOC charge, and none of the intervenors had filed a charge. *Id.* In *DeMedina*, the court allowed an intervenor to rely on the EEOC charge filed by a fellow intervenor alleging similar claims to satisfy the single-filing rule. *DeMedina*, 686 F.2d at 1012. In *Wheeler*, the court allowed intervention stating that, "[t]he original plaintiffs and the intervenors are members of the same class [and therefore,] [a]ny distinction between them such as the filing of an EEOC ... complaint ... is not significant." *Wheeler*, 563 F.2d at 1239, *quotes omitted.* In *Ezell*, the court implicitly acknowledged the single-filing rule but held that the single intervenor had not pleaded a claim similar enough to the original plaintiff's claim to permit intervention. *Ezell*, 709 F.2d at 1381.

In this case, the Fourth Circuit erred in failing to adopt the single-filing rule. This error is contrary to the spirit of Title VII and the law of other circuits. Therefore, this Court should adopt the single-filing rule in the context of intervention for Title VII sexual harassment, hostile work environment claims, and resolve the split and confusion among the circuits over the application of the rule.

Applying the single-filing rule to this case compels the addition of the intervenors to the suit. "[T]he critical factor in determining whether an individual Title VII plaintiff must file an EEOC charge, or whether he may escape this requirement by joining with another plaintiff who has filed such a charge, is the similarity of the

two plaintiffs' complaints." *Foster*, 655 F.2d at 1322. The intervenors present a classic case for application of the single-filing rule: in comparison to King's claims, the intervenors' claims are identical, are based on facts similar to those alleged by King and occurred during the same time period. King alleges sexual harassment and a hostile work environment that occurred from soon after her date of hire, August 2000, until March 2004 when she resigned. Each intervenor alleges sexual harassment that occurred within this time frame, except Bland, who alleges harassment that occurred approximately five months after King's resignation (but within King's statutory period to file her EEOC complaint).

The EEOC's deadline to file a charge does not apply to intervenors' claims because their claims arose within the time period that King alleged a hostile work environment occurred, i.e., a continuing violation. This Court held in *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101, 1225 S.Ct. 2061, 153 L.Ed.2d 106 (2002), "that consideration of the entire scope of a hostile work environment claim, including behavior alleged outside the statutory time period, is permissible for the purposes of assessing liability, *so long as an act contributing to that hostile environment takes place within the statutory time period.*" *Morgan*, 536 U.S. at 105, *emphasis added*. *See also Ledbetter v. Goodyear*, 550 U.S. ___, 127 S.Ct. 2162, 2175, 167 L.Ed.2d 982, 999, n.7 (2007). King has alleged acts contributing to the hostile work environment that took place within the statutory period. Allowing intervenors' claims to be added to those of King, especially when class certification has been denied,

is the logical conclusion under application of the rule and would further the "remedial purpose of the legislation." *Zipes*, 455 U.S. at 393.

The intervenors in this case have an even stronger case than the plaintiffs in *Wilson Metal*, *supra*. In that case, the EEOC filed suit on behalf of the three plaintiffs. The sexual harassment alleged in that suit occurred in 1982 against one plaintiff, included retaliatory discharge for that plaintiff and the second plaintiff in 1984 that related to the 1982 harassment, and alleged sexual harassment of the third plaintiff when she worked for Wilson Metal for three months in 1987. *Wilson Metal*, 24 F.3d at 839. The harassment to which the first and third plaintiffs were subjected was similar. *Id.* The first two plaintiffs filed EEOC charges after their discharge in 1984. *Id.* Wilson's sexual harassment of the third plaintiff, McMullan, occurred nearly three years after the EEOC charges were filed, and McMullan never filed an EEOC charge. *Id.* Explicitly adopting and applying the single-filing rule, the Sixth Circuit found that McMullen's claim was properly included in the suit.[3] *Id.* at 840. In this case, not only are the actual acts of sexual harassment similar, but the acts occurred during the same time period instead of being separated by a three-year gap.

Some courts of appeals have required varying levels of reference in an EEOC charge to put a

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[3] If McMullan, whose alleged harassment is included with the original plaintiff's claim of three years prior, then certainly Malinda Bland's claim, with only a five-month gap, should be included in King's suit.

defendant on notice that other complainants may exist. This requirement is not sufficient to deny intervention in this case. King's EEOC charge provided sufficient notice to McMillan that others suffered similar treatment as she alleged. *See Howlett v. Holiday Inns*, 49 F.3d 189, 196 (6th Cir. 1995). The charge stated that King believed "that the department and the Sheriff have treated other females similarly," that she "knew from both rumor and experience that the sheriff was very 'hands on' with female employees," and that she "got struck by 'the grope-a-lope,' a nickname the sheriff has earned through hugs that cross into 'copping a feel.'" *See EEOC Charge, included in the Appendix*. The EEOC charge deemed sufficient in *Howlett* contained only two passing references that persons other than the initial complainant may have suffered discrimination. *Howlett*, 49 F.3d at 196.

Once intervenors are deemed to satisfy the single-filing rule, then the analysis must proceed directly to application of the requirements for intervention pursuant to Fed. R. Civ. P. 24. To intervene as a matter of right, a proposed intervenor must satisfy four criteria.

First, "the motion to intervene must be timely made." *Foster*, 655 F.2d at 1324. In this case, the intervenors moved to intervene within 60 days of the filing of King's Complaint and while King's motion to certify class action was pending. In *Foster*, *supra*, the motion to intervene was "made little more than one month after the district court denied the original plaintiffs' motion for class certification." *Id.* Therefore, in this case, the motion to intervene can

not be said to be untimely, and no party to the proceedings has or will suffer prejudice by allowing intervention. *Id.*

Next, "an intervenor of right [must] claim an interest relating to the property or transaction which is the subject of the action, and that "the intervenor [must] be so situated that as a practical matter disposition of the action may impair or impede his ability to protect that interest." *Id.* By alleging that a hostile work environment existed during their employment with Sheriff McMillan and which occurred during King's term of employment, the intervenors "have an interest relating to the ... subject of the action" because a finding as to whether a hostile work environment existed at the Sheriff's office during the time period alleged by King would affect their rights. *Id.*

Finally, the intervenors must show that their interests "are not adequately represented by the existing parties. This burden is minimal and is met if [the intervenors] show that representation 'may' be inadequate." *Id.* at 1325. In this case, representation by King alone is not sufficient because the compensation sought by the intervenors cannot be awarded if they are not parties to the action. *Id.*

Therefore, this Court should adopt the single-filing rule in sexual harassment, hostile work environment claims, and permit the intervenors to be added to King's suit pursuant to Fed. R. Civ. Pr. 24(a).

II. THE PLAIN LANGUAGE OF RULE 24 OF THE FEDERAL RULES OF CIVIL PROCEDURE PERMITS INTERVENTION BY A SINGLE INTERVENOR IN TITLE VII SEXUAL HARASSMENT, HOSTILE WORK ENVIRONMENT CLAIMS.

Rule 24 of the Federal Rules of Civil Procedure sets forth the standard trial courts use to consider whether a party should be allowed to intervene. Intervention may be as of right under Fed. R. Civ. P. 24(a), or permissive under Fed. R. Civ. P. 24(b). In this case Malinda Bland satisfied the requirements for intervention as of right and for permissive intervention.

The Fourth Circuit denied intervention to Malinda Bland. After dismissing the claims of the other five intervenors the Fourth Circuit found that Bland could not intervene because she was a sole intervenor. *See Opinion, included in the Appendix.* Bland satisfied the single-filing rule but the Fourth Circuit denied Bland intervention relying on a single opinion from the Seventh Circuit, *Horton v. Jackson Co. Bd of Comm'rs*, 343 F.3d 897 (7th Cir. 2003). *Horton* denied intervention in the context of the single-filing rule when only one intervenor existed. *Horton*, 343 F.3d at 900. Neither the single-filing rule nor the plain language of Fed. R. Civ. P. 24 require multiple intervenors.

As demonstrated in part I above, each intervenor in this case, including Malinda Bland, satisfied the requirements for intervention as of right. Bland and the other intervenors moved to

intervene less than 60 days after King filed suit, and while a motion to certify the case as a class action was pending.[4] Therefore, the motion to intervene was timely.[5] *Foster*, 655 F.2d at 1324. Next, Bland must show an interest in the litigation that may be impaired or impeded if she is not allowed to intervene. *Id.* Bland and King allege a hostile work environment and assault and battery. A finding in King's suit that no hostile work environment existed would impair or impeded Bland in her suit. Lastly, Bland's interest maybe not be adequately represented if she is not included in the suit because she seeks compensation for her injuries, which cannot be awarded if she is not a party. *Id.*

The requirements for permissive intervention are (1) timely application, and (2) a "conditional right to intervene" conferred by "a statute of the United States," or a common question of fact or law of the "applicant's claim or defense and the main action." *Fed. R. Civ. P. 24(b).* In addition, "the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id.* Bland satisfied the requirements for permissive intervention: the motion to intervene was timely filed; Bland asserted a

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[4] Had the motion to certify been granted then Bland would have been included in the class.

[5] "In a class action the critical issue with respect to timeliness is whether the proposed intervenor moved to intervene 'as soon as it became clear ... that the interests of the unnamed class members would no longer be protected by the named class representatives.'" *Hill v. Western Electric Co., Inc.*, 672 F.2d 381 (4th Cir. 1982), *quoting United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394, 97 S.Ct. 2464, 2469, 53 L.Ed.2d 423 (1977).

common question of law, i.e., whether defendant McMillan maintained a hostile work environment; and the motion to intervene had no likelihood of causing undue delay or prejudice to the parties given the early stage of the litigation at which it was filed.

Ignoring the plain language of Rule 24, the Fourth Circuit imposed an additional requirement for intervention in single-filing rule cases: that more than one intervenor exist. No such requirement exists under the Federal Rules of Civil Procedure. First, Bland is not a sole intervenor, she is one of six intervenors with claims highly similar to each other and to the claims of King, and she would have been part of the class that King initially sought to have certified. Bland is like the intervenors in *Ezell*, *supra*, and *Wilson Metal*, *supra*. The *Ezell* court would have permitted the intervenor to be added to the suit under the single-filing rule but for its holding that the intervenor's claim was not sufficiently similar to satisfy the single-filing rule. *Ezell*, 709 F.2d at 1381. In this case, no question exists that Bland's claims are similar to those of King. In *Wilson Metal*, the court allowed intervention of a single plaintiff under the single-filing rule. *Wilson Metal*, 24 F.3d at 839. The original case consisted of only two plaintiffs, who were husband and wife. *Id.* The husband alleged only retaliatory discharge, while the wife alleged sexual harassment and retaliatory discharge. *Id.* The acts relied upon by the intervenor were similar only to the claims of the wife. *Id.*

Moreover, a requirement that more than one intervenor exist to permit intervention in cases

applying the single-filing rule is contrary to the "remedial purpose of [Title VII]." *Zipes*, 455 U.S. at 393. Such a requirement establishes the untenable position that a claimant seeking to allege a Title VII violation cannot obtain redress unless the harasser abused more than two persons. More importantly, this requirement ignores the focus of the single-filing rule: the focus is on the similarity of the claim of the plaintiff who has not exhausted her administrative remedies to the claim of the plaintiff who has exhausted her administrative remedies, not on the number of plaintiffs who can be found to seek intervention. *Foster supra*. The D.C. Circuit implicitly acknowledged the validity of the sole intervenor circumstance through *Foster* and its explanation of *Foster* in *DeMedina*, *supra*. "[T]he court held [in *Foster*] that where two plaintiffs allege that they were similarly situated and received the same discriminatory treatment, the purposes of the exhaustion requirement are adequately served if one plaintiff has filed an EEOC complaint." *DeMedina*, 686 F.2d at 1013, *citing Foster* 655 F.2d at 1322 ("The rationale of the [single-filing rule] has been extended to situations where ... the court was nonetheless able to treat as a class a plaintiff who had satisfied the EEOC filing requirement and *one or more* plaintiffs who had not satisfied that requirement." *emphasis added*).

The clear purpose of the single-filing rule and intervention is to permit plaintiffs with similar claims to dispose of those claims through a single suit. Bland satisfies all requirements for intervention under Fed. R. Civ. P. 24 and she satisfies the single-filing rule. To deny Bland's

motion to intervene is a clear abuse of discretion in this matter, and the motion to intervene as to Bland should have been granted.

CONCLUSION

The single-filing rule effectuates the "Congressional purpose expressed in Title VII"[6] and furthers the "remedial purpose of the legislation."[7] Therefore, the rule should be adopted by this Court. Further, applying the rule to this case compels the conclusion that the intervenors should be permitted to intervene as a matter of right.

Respectfully submitted,

/s/ Terry N. Grimes
Of counsel

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[6] *Wheeler*, 563 F.2d 1233, 1239 (5th Cir. 1977), *citing Albemarle Paper, supra*.

[7] *Zipes*, 455 U.S. at 393.

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-1183

LESPIA KING,
Plaintiff - Appellant,

JENNIFER DONOVAN;
MALINDA BLAND; KRISTIN DARNELL;
TAMARA SPEIGHT; ERIN BACHINSKY;
ANGELA LINKOUS,
Intervenors,

versus

GEORGE M. MCMILLAN, Sheriff,
Roanoke City Sheriff's Office,
Defendant - Appellee.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Samuel G. Wilson, District Judge. (7:05-cv-00521-sgw)

Argued: March 14, 2007 Decided: May 4, 2007

[Entered: May 4, 2007]

Before MICHAEL and KING, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

ARGUED: Melvin Edward Williams, TERRY N. *GRIMES, P.C., Roanoke, Virginia, for Appellant.* Elizabeth Kay Dillon, GUYNN, MEMMER & DILLON, P.C., Roanoke, Virginia, for Appellee. **ON BRIEF:** Terry N. Grimes, Roanoke, Virginia, for Appellant.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Six women who claim to have been sexually harassed by Sheriff George McMillan of Roanoke, Virginia, appeal the district court's order denying their motion to intervene in a Title VII suit against McMillan filed by Lespia King. For the reasons explained below, we affirm.

I.

Lespia King worked as a Deputy in the Roanoke City Sheriff's Office from August 2000 until April 2004, when she resigned because of alleged sexual harassment by Sheriff McMillan. On October 12, 2004, King filed a charge with the EEOC alleging constructive discharge as a result of harassment and discrimination. The EEOC issued a right to sue letter on June 8, 2005, and King filed this action on August 16, 2005. On September 16, 2005, King filed a motion to certify a class action. The district court denied the motion as untimely because King did not move to certify the class during the 90-day period following issuance of the right to sue letter. 42 U.S.C. § 2000e-5(f)(1).

On October 7, 2005, six women -- putative members of the class that King unsuccessfully proposed to represent -- moved to intervene in King's suit as plaintiffs. The proposed intervenors are: Tamara Speight, a former employee of Prison Health Services (PHS), an independent contractor of the Roanoke City jail, who claims that McMillan harassed her until she left her job in October 2001; Erin Bachinsky, a woman never employed by the Sheriff's Office who claims that McMillan harassed her during a job interview; Kristin Darnell, a former Sheriff's Office employee who claims that McMillan harassed her until she resigned in August 2002; Jennifer Donovan, a former Sheriff's Office employee who claims that McMillan harassed her until she resigned in October 2002; Angela Linkous, a former PHS employee who asserts that McMillan harassed her until her resignation in February 2003; and Malinda Bland, who claims that McMillan harassed her during her one week of employment by the Sheriff's Office in August 2004. Like King, all six of these women allege that McMillan made unwanted sexual remarks to them, groped them, and inappropriately touched them.

None of the proposed intervenors exhausted their administrative remedies by filing charges with the EEOC. The six argue they should be able to join the suit as plaintiffs because the prerequisite of filing a timely charge with the EEOC was met by King, the original plaintiff. When the other requirements for intervention are satisfied, a number of circuits allow intervenors in discrimination suits to rely on the original plaintiff's EEOC charge in lieu of requiring each to file an

individual charge with the agency. See, e.g., EEOC v. Wilson Metal Casket, Co., 24 F.3d 836, 840 (6th Cir. 1994); Snell v. Suffolk, 782 F.2d 1094, 110 (2d Cir. 1986); Ezell v. Mobile Housing Bd., 709 F.2d 1376, 1381 (11th Cir. 1983); DeMedina v. Reinhardt, 686 F.2d 997, 1012-13 (D.C. Cir. 1982); Crawford v. United States Steel Corp., 660 F.2d 663, 665-66 (5th Cir. 1981); Allen v. Amalgamated Transit Union Local 788, 554 F.2d 876, 882-83 (8th Cir. 1977). While our circuit has long applied this "single-filing rule" to class actions, see Chisholm v. U.S. Postal Serv., 665 F.2d 482, 490 n.11 (4th Cir. 1981), we have never decided whether the rule may be applied to intervenors. Only the Third Circuit has confined application of the single-filing rule to class actions. See Whalen v. W.R. Grace & Co., 56 F.3d 504, 507 (3d Cir. 1995).

The district court concluded that it did not have to reach the question of whether intervenors can rely on the single-filing rule because it determined that the prerequisites for applying the rule are not present in this case. First, the district court concluded that the proposed intervenors' claims were not substantially similar to King's. Second, the court concluded that King's EEOC charge did not provide sufficient notice of the collective nature of her claims. Finally, the court noted that at the time King filed her EEOC charge, the claims of all proposed intervenors, except Malinda Bland's, were time barred. The district court explained that the single-filing rule cannot be used to resuscitate stale claims.

King and the proposed intervenors appeal the denial of the motion to intervene.

II.

Under Title VII a civil suit against the respondent named in an administrative charge may be brought after administrative proceedings have ended or conciliation attempts have failed. 42 U.S.C. § 2000e-5(f)(1). The requirement to file a charge with the EEOC serves two purposes: "First, it notifies the charged party of the asserted violation. Secondly, it brings the charged party before the EEOC and permits effectuation of the Act's primary goal, the securing of voluntary compliance with the law." Alvarado v. Board of Trustees, 848 F.2d 457, 458-59 (4th Cir. 1988) (internal quotation omitted).

The single-filing rule is a judge-made exception to the requirement of administrative exhaustion. Horton v. Jackson County Bd. of County Comm'rs, 343 F.3d 897, 899 (7th Cir. 2003). In those circuits that follow it, the single-filing rule "allows plaintiffs who have not exhausted the administrative requirement of filing with the EEOC to join in a lawsuit with other plaintiffs who have exhausted the requirement, provided that all plaintiffs' claims are substantially similar and that the EEOC charge itself gave notice of the charge's collective nature." White v. BFI Waste Servs., LLC, 375 F.3d 288, 293 (4th Cir. 2004). Underlying the rule is the understanding that "[i]t would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints with the EEOC." Oatis v. Crown

Zellerbach Corp., 398 F.2d 496, 498 (5th Cir. 1968). When the initial plaintiff files an administrative charge making clear that her grievance is shared by a group of similarly situated employees, the rule does not interfere with the purposes of providing notice and an opportunity for conciliation. Courts applying the rule explain that nothing is gained by duplicative administrative filings because "[i]f it was impossible for the EEOC to effectuate a settlement of the original plaintiffs' claims, there is no reason to believe that the EEOC would be successful in settling [later intervenors'] claims." Foster v. Gueory, 655 F.2d 1319, 1323 (D.C. Cir. 1981).

We need not decide whether to join those circuits that apply the single-filing rule to non-class actions because we conclude that the rule would not be properly applied in this case. The district court was correct in concluding that the claims of five of the six proposed intervenors are time barred. A plaintiff alleging violation of Title VII in Virginia must file a charge with the EEOC within 300 days of the alleged violation. Venkatraman v. REI Sys., 417 F.3d 418, 420 (4th Cir. 2005). On the date that King filed her EEOC charge, any claims that Donovan, Darnell, Speight, Bachinsky, or Linkous might have pressed had already expired. The single-filing rule is not properly used to resurrect statutorily barred claims. Cf. AMTRAK v. Morgan, 536 U.S. 101, 113 (2002) ("[D]iscrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges.").

This leaves only the claim of Malinda Bland. We agree with the Seventh Circuit that in most

cases where there are only two complainants, the rationale underlying the single-filing rule "is attenuated to the point of non-existence." Horton, 343 F.3d at 900. In a two-complainant case, it is much more difficult to justify excusing a single intervenor from the normal administrative exhaustion requirements. Requiring a lone intervenor to file a timely charge does not impose a substantial burden on either the EEOC or the employer. Instead, requiring both the original plaintiff and a later intervenor to file their own charges is consonant with "the statutory goal of maximum possible reliance upon voluntary conciliation and administrative resolution of claims." EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 602 (1981). As a result, we find no error in the district court's denial of the motion to intervene as to Bland.

The district court's order denying the motion to intervene is therefore

AFFIRMED.

JUDGMENT

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

No. 06-1183
7:05-cv-00521-sgw

FILED: May 4, 2007

[Entered: May 4, 2007]

LESPIA KING;
Plaintiff - Appellant

JENNIFER DONOVAN;
MALINDA BLAND; KRISTIN DARNELL;
TAMARA SPEIGHT; ERIN BACHINSKY;
ANGELA LINKOUS
Intervenors

v.

GEORGE M. MCMILLAN, Sheriff,
Roanoke City Sheriff's Office
Defendant - Appellee

Appeal from the United States District Court for the Western District of Virginia at Roanoke

In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor
CLERK

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

LESPIA J. KING, Plaintiff,	)	Civil Action No. 7:05CV00521
v.	)	ORDER
GEORGE M. McMILLAN, SHERIFF, ROANOKE CITY SHERIFF'S OFFICE, Defendant.	)	By: Samuel G. Wilson United States District Judge

In accordance with the memorandum opinion entered this day, it is hereby **ORDERED** and **ADJUDGED** that the motions of Tamara Speight, Erin Bachinsky, Kristin Darnell, Jennifer Donovan, Angela Linkous, and Malinda Bland to intervene are **DENIED**.

ENTERED: This [5th] day of January, 2006.

/s/
UNITED STATES DISTRICT JUDGE

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

LESPIA J. KING, Plaintiff,	)	Civil Action No. 7:05CV00521
v.	)	MEMORANDUM OPINION
GEORGE M. McMILLAN, SHERIFF, ROANOKE CITY SHERIFF'S OFFICE, Defendant.	)	By: Samuel G. Wilson United States District Judge

Lespia J. King brings this suit pursuant to Title VII, claiming that Roanoke City Sheriff George M. McMillan maintained a hostile work environment by making various sexually charged comments and engaging in unwelcome physical contact. Several other women, who claim McMillan also harassed them but who never exhausted their administrative remedies, have moved under Federal Rule of Civil Procedure 24(b) to intervene as plaintiffs under the so-called "single-filing rule." Because King's EEOC charge did not forecast a collective action, because the putative plaintiffs' claims are factually dissimilar, and because five of the six putative plaintiffs could not have filed timely charges with the EEOC at the time King filed hers, the court denies their motions to intervene.

I.

King began her work as a Roanoke City deputy in August 2000, and she alleges that, up until her resignation in April 2004, McMillan sexually harassed her on several occasions by making inappropriate sexual comments and by engaging in unwelcome physical contact. On October 12, 2004, King filed a charge with the EEOC, alleging that the hostile work environment maintained by McMillan had resulted in her constructive discharge. In her charge, King chronicled her alleged experiences while working under McMillan; she only referred to the experiences of other women in the closing sentence of the charge, stating, "I believe that the department and the sheriff have treated other females similarly. . . ."

The EEOC issued a right to sue notice on June 8, 2005, and King filed the current suit on August 16, 2005. On September 16, 2005, King filed a motion to certify a class; the court denied the motion, finding that it was untimely and that, regardless, the numerosity and commonality requirements for class certification had not been met. Several members of that putative class have now moved to intervene as plaintiffs: Tamara Speight, an employee of Prison Health Services (PHS), an independent contractor of the Roanoke City Jail, claims McMillan harassed her until she resigned in October 2001; Erin Bachinsky claims that McMillan sexually harassed her during a job interview in January or March of 2002; Kristin Darnell claims McMillan harassed her until she resigned in August 2002; Jennifer Donovan claims McMillan harassed her until she resigned in October 2002; Angela Linkous, another PHS employee,

claims McMillan harassed her until she resigned in February 2003; and Malinda Bland, claims McMillan harassed her during her one week of jail employment in August 2004.

II.

Even were the court to apply the "single-filing rule" here,[1] the court would only allow permissive intervention[2] if King's EEOC charge "gave notice of the charge's collective nature" and if King's and the putative plaintiffs' claims were "substantially similar." See White v. BFI Waste Services, 375 F.3d 288, 293 (4th Cir. 2004) (describing but not applying the "single-filing rule": "[it] . . . allows plaintiffs who have not exhausted the administrative requirement of filing with the EEOC to *join* in a lawsuit with other plaintiffs who have exhausted the requirement, provided that all plaintiffs' claims are substantially similar and that the EEOC charge itself gave notice of the charge's collective nature.") (emphasis in original). Even then, the court could only allow intervention by putative plaintiffs whose claims were not statutorily barred, that is by individuals who either had or could have exhausted their administrative remedies on the day King filed

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[1] See White, 375 F.3d at 293 (pointing out that, though other circuits have, the Fourth Circuit, has never adopted or applied the "single-filing rule" to a motion to intervene).

[2] To the extent, if any, that the putative plaintiffs seek intervention as a matter of right pursuant to Federal Rule of Civil Procedure 24(a), the court finds that there is little or no danger "that the disposition of the action may as a practical matter impair or impede [the putative plaintiffs'] ability[ies] to protect [their] interest[s]."

her charge with the EEOC. See Hill v. Western Electric Co., 672 F.2d 381, 394-395 (4th Cir. 1982) ("[I]f the statute of limitations had already expired for the individual who the action was first commenced, then the individual cannot be considered a member of the class before the court.").

These requisites for application of the "single-filing rule" are not present here. King's EEOC charge, with its singular, cursory reference to other women, did not provide sufficient notice of the collective nature of King's claims.[3] Further, as the court pointed out when denying King's motion to certify class, the alleged experiences of these women contrast sharply: some putative plaintiffs were employees of the jail, some were employees of an independent contractor of the jail, and one was never hired at all. These disparate claims present differing questions of fact and law, leading the court to find that the claims are not "substantially similar." Moreover, King filed her EEOC charge on October 12, 2004, by which time the claims of all the

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[3] See Chacko v. Patuxent Institution, 429 F.3d 505, 506 (4th Cir. 2005) ("'Only those discrimination claims stated in the initial charge, those reasonably related to the original complaint, and those developed by reasonable investigation of the original complaint may be maintained in a subsequent Title VII lawsuit.'") (quoting Evans v. Techs. Applications & Serv. Co., 80 F.3d 954, 963 (4th Cir. 1996)); Kloos v. Carter-Day Co., 799 F.2d 397, 400 (8th Cir. 1986) (ADEA case) (holding that "[a]n administrative charge of one or more plaintiffs setting forth only personal claims of discrimination . . . is not sufficient to serve as the basis for a[] . . . class action."); Naton v. Bank of California, 649 F.2d 691, 697 (9th Cir. 1981) (refusing to apply "single-filing rule" when the primary plaintiff's charge "expressed no intention to sue on behalf of anyone other than himself.").

putative plaintiffs, save Bland, had become stale[4] – meaning five of the six putative plaintiffs had not and could not have filed charges with the EEOC on the day King did. The "single-filing rule" does not apply to statutorily barred claims and, therefore, cannot resuscitate those stale claims.

III.

For the reasons stated herein, the court denies the motions to intervene.

ENTERED: This [5th] day of January, 2006.

/s/
UNITED STATES DISTRICT JUDGE

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[4] Only individuals suffering harassment within 300 days of October 12, 2004, the day King filed her charge, could have filed timely charges with the EEOC on that date. See Tinsley v. First Union Nat. Bank, 155 F.3d 435, 439 (4th Cir. 1988) ("The basic limitations period is 180 days after the alleged unlawful employment practice. However, the limitations period is extended to 300 days when state law proscribes the alleged employment practice and the charge has initially been filed with a state deferral agency . . . .") (citing 42 U.S.C. § 2000e-5(e)(1)). Thus, claims related to McMillan's alleged behavior before December 17, 2003, were stale by the time King filed her charge. Aside from Bland, Linkous had the freshest claim of the putative plaintiffs, appearing to claim that McMillan harassed her as recently as February 2003. However, because her claim pre-dated the December 17, 2003, cutoff, even it was stale by the time King filed.

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

LESPIA J. KING, Plaintiff,	)	Civil Action No. 7:05CV00521
v.	)	ORDER
GEORGE M. McMILLAN, SHERIFF, ROANOKE CITY SHERIFF'S OFFICE, Defendant.	)	By: Samuel G. Wilson United States District Judge

In accordance with the memorandum opinion entered this day, it is hereby **ORDERED** and **ADJUDGED** that King's motion to certify class is **DENIED** and that McMillan's motion to dismiss is **DENIED**.

ENTERED: This [20th] day of October, 2006.

/s/
UNITED STATES DISTRICT JUDGE

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

LESPIA J. KING, Plaintiff,	)	Civil Action No. 7:05CV00521
v.	)	MEMORANDUM OPINION
GEORGE M. McMILLAN, SHERIFF, ROANOKE CITY SHERIFF'S OFFICE, Defendant.	) By: Samuel G. Wilson United States District Judge	

Lespia J. King brings this suit pursuant to Title VII, claiming that Roanoke City Sheriff George M. McMillan maintained a hostile work environment by making various sexually charged comments and engaging in unwelcome physical contact. King also claims that McMillan has subjected other female employees to a hostile work environment and seeks certification of a class. Meanwhile, McMillan has filed a motion to dismiss. The court finds that King's motion to certify class is untimely and that she has failed to meet the numerosity and commonality requirements for class certification. The court, therefore, denies King's motion to certify class. However, the court finds that King has stated a hostile work environment claim related to her own alleged experiences and accordingly denies McMillan's motion to dismiss.

I.

King began her work as a Roanoke City deputy in August 2000, and she alleges that, up until her resignation in April 2004, McMillan sexually harassed her on several occasions by making inappropriate sexual comments and by engaging in unwelcome physical contact. On October 12, 2004, King filed a charge with the EEOC, alleging that the hostile work environment maintained by McMillan had resulted in her constructive discharge. The EEOC issued a right to sue notice on June 8, 2005, and King filed the current suit on August 16, 2005. King did not explicitly designate her suit as a class action anywhere in her original complaint; nor did she suggest that a motion to certify class would follow. King, however, did state that McMillan "had an obligation to maintain a work environment that was not . . . hostile to plaintiff and other women," that McMillan had violated federal law "by permitting a work environment . . . that was . . . offensive to plaintiff and other women, and that she had "heard several comments from other deputies about the Sheriff's behavior with plaintiff and other female deputies."

On September 16, 2005, King filed a motion to certify a class consisting of "all women in the United States (except for the states of California, Nevada, Arizona, and Idaho) who have been sexually harassed by George M. McMillan, Sheriff of the City of Roanoke, Virginia."[1] King estimated that the class included 30 or more individuals, and King specifically summarized the experiences of three

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[1] Several members of the putative class have also filed a motion to intervene and join as individual plaintiffs. The court does not address those motions at this time.

women who claim that McMillan harassed them. Additionally, three other women have filed affidavits alleging McMillan harassed them. One of the women claims that she never worked with McMillan but that he harassed her during a job interview. Another of the women claims that McMillan harassed her during the course of her employment with Prison Health Services, an independent contractor of the Roanoke City Jail.

II.

A Title VII plaintiff must file suit within 90 days from the issue of an EEOC right to sue notice. 42 U.S.C. § 2000e-16(c)). If the plaintiff intends to proceed with a class action, the plaintiff must provide notice "of the number and generic identities of the potential plaintiffs who may participate in the judgment" within that 90-day period.[2] King filed her

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[2] See Smith v. Pennington, 352 F.3d 884, (4th Cir. 2003) ("The scope of a plaintiff's asserted class for tolling purposes is that class for which there was fair notice as to both the substantive claims and the number and generic identities of the potential plaintiffs that might participate in the judgment if the plaintiff's desired class was, in fact, certified.") (internal quotes omitted); Wade v. Danek Medical, Inc., 182 F.3d 281, 288 n9 (4th Cir. 1999) ("One of the purposes of a statute of limitations is to put a defendant on notice of the claims against him within the specified period. [T]he class action plaintiff must 'notif[y] the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment.') (internal citations omitted) (quoting American Pipe and Constr. Co. v. Utah, 414 U.S. 538, 555 (1974)); see also United Airlines, Inc. v. McDonald, 432 U.S. 385, 392-93 (1977) ("The lawsuit had been commenced by the timely filing of a complaint for classwide relief, providing United with 'the

original complaint on August 16, 2005, within 90 days of the EEOC's June 8, 2005, right to sue notice; however, she did not file her motion to certify class until September 16, 2005, after the 90-day period had expired.[3] Thus, unless King's original complaint adequately put the defendants on notice of the class nature of the action, King is time barred from bringing a class action based on her EEOC charge. The court finds that the complaint did not provide the required notice and accordingly denies King's motion to certify class.

The King's complaint occasionally asserted that McMillan had harassed other female employees, King provided no details as to the number or identities of those other employees, and the overwhelming majority of the complaint focused on King's own experiences while working under McMillan with scant reference to assertions she now labels class claims. Moreover, King's complaint and prayer for relief gave no indication whatsoever that anyone other than King herself might participate in an eventual judgment. Thus, the court finds that the complaint did not provide notice "of the number and generic identities of the potential plaintiffs who may participate in the judgment" and that King, therefore, failed to bring her class action within the statutory 90-day period.

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essential information necessary to determine both the subject matter and size of the prospective litigation . . . .') (quoting American Pipe, 414 U.S. at 552-53.).

[3] Defendant argues that King failed to include class allegations in her EEOC charge. The court need not and does not address that alleged omission.

Even were King's motion to certify class timely, the court would deny it because essential requirements of Federal Rule of Civil Procedure 23 are not met. Rule 23 requires that the class be "so numerous that joinder of all members is impracticable." In King's case, only women who had exhausted or could have exhausted their administrative remedies at the time King filed the class action would be eligible to participate in the class.[4] The class could only include women who already had filed grievances with the EEOC and whose 90 days to file suit had not lapsed or women who had worked in the allegedly hostile work environment within 300 days[5] of King filing the class action but had yet to file a charge with the EEOC. King cursorily asserts that the putative class might eventually encompass 30 women residing in different parts of the country; however, she has forecasted no evidence to support the existence of these 30 hypothetical women, much less to suggest that they would be eligible to participate in the class in light of the relevant statutes of limitations. In fact, through her complaint and affidavits, King has brought the

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[4] See Hill v. Western Elec. Co., Inc., 672 F.2d 381, (4th Cir. 1982) ("[I]f the statute of limitations had already expired for the individual when the action was first commenced, then the individual cannot be considered a member of the class before the court.").

[5] See Tinsley v. First Union Nat. Bank, 155 F.3d 435, 439 (4th Cir. 1988) ("The basic limitations period is 180 days after the alleged unlawful employment practice. However, the limitations period is extended to 300 days when state law proscribes the alleged employment practice and the charge has initially been filed with a state deferral agency . . . .") (citing 42 U.S.C. § 2000e-5(e)(1)).

identities and alleged experiences of six women to the attention of the court, and it would appear that the claims of at least four of those women were time barred a the time King filed suit, meaning the women would be ineligible to participate in the class. Moreover, regardless of how many women might actually be eligible to participate in the class, King has failed to demonstrate who intervention on an individual basis would be impracticable in this case. Thus, the court finds that King has failed to demonstrate the existence of a group "so numerous that joinder of all members is impracticable."

Rule 23 also requires that there be "questions of law or fact common to the class." The experiences of the six women to whom King has directed the court's attention vary dramatically. One woman cites a one-time encounter with McMillan while she was working for an independent contractor of the Roanoke City Jail. Another woman never worked under McMillan but claims that McMillan sexually harassed her during a job interview. Thus, within the same case, the court would have to address the unshared issues of whether a defendant might be liable for contributing to the hostile work environment of an employee of an independent contractor and whether an individual claiming harassment during an interview may proceed on a hostile work environment theory. Accordingly, the court finds that the requirement that the class members share questions of law and fact is not met.

III.

In addition to opposing King's motion to certify class, McMillan has filed a motion to dismiss.

However, when viewing King's allegations in the light most favorable to her, as the court must at this juncture, the court finds that King has stated individual claims for hostile work environment and constructive discharge and, therefore, denies McMillan's motion to dismiss.

IV.

For the reasons stated herein, the court denies King's motion to certify class and denies McMillan's motion to dismiss.

ENTERED: This [20th] day of October, 2005.

/s/
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-1183
7:05-cv-00521-sgw

FILED May 30, 2007

[Entered: May 30, 2007]

LESPIA KING;
Plaintiff - Appellant

JENNIFER DONOVAN;
MALINDA BLAND; KRISTIN DARNELL;
TAMARA SPEIGHT; ERIN BACHINSKY;
ANGELA LINKOUS
Intervenors

v.

GEORGE M. MCMILLAN, Sheriff,
Roanoke City Sheriff's Office
Defendant – Appellee

On Petition for Rehearing and Rehearing En Banc

The Appellant's and Intervenors' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Michael, Judge King, and Senior Judge Hamilton.

For the Court,

/s/ Patricia S. Connor
CLERK

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

Only one form need be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of individual parties as well as corporate parties. Disclosures are required from amicus curiae only if amicus is a corporation. Counsel has a continuing duty to update this information. Please file an original and three copies of this form.

No. 06-1183 Caption: Lespia J. King v. George M. McMillan, Sheriff

Pursuant to FRAP 26.1 and Local Rule 26.1,

Lespia J. King, et al. who is appellant ,
(name of party/amicus) (appellant/appellee/amicus)

makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?

   [ ] YES [✔] NO

2. Does party/amicus have any parent corporations?

   [ ] YES [✔] NO

   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?

[ ] YES [✓] NO

If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?

[ ] YES [✓] NO

If yes, identify entity and nature of interest:

5. Is party a trade association?

[ ] YES [✓] NO

If yes, identify all members of the association, their parent corporations, and any publicly held companies that own 10% or more of a member's stock:

6. If case arises out of a bankruptcy proceeding, identify any trustee and the members of any creditors' committee:

/s/ Terry N. Grimes (signature)

February 10, 2006 (date)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

LESPIA J. KING,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.
	)	7:05CV00521
GEORGE M. McMILLAN,	)	
SHERIFF, ROANOKE CITY	)	
SHERIFF'S OFFICE,	)	
	)	
Defendant.	)	

[Entered: January 21, 2006]

NOTICE OF APPEAL

Notice is hereby given that Lespia J. King and prospective intervenors Jennifer Donovan, Malinda Bland, Kristin Darnell, Tamara Speight, Erin Bachinsky, and Angela Linkous, hereby appeal to the United States Court of Appeals for the Fourth Circuit from the order of the United States District Court for the Western District of Virginia, Roanoke Division, entered in this action on the 5th day of January, 2006 denying the motion to intervene filed by the prospective intervenors.

Respectfully submitted,

LESPIA J. KING, JENNIFER DONOVAN, MALINDA BLAND, KRISTIN DARNELL, TAMARA SPEIGHT, ERIN BACHINSKY, AND ANGELA LINKOUS

By /s/ Terry N. Grimes
Of Counsel

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Of Counsel for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Notice of Appeal was electronically forwarded and/or mailed to Elizabeth K. Dillon, Esquire, Guynn Memmer & Dillon, 415 S. College Avenue, Salem, VA 24153, counsel for defendant this 31st day of January, 2006.

/s/ Terry N. Grimes
Of Counsel

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

LESPIA J. KING, JENNIFER DONOVAN, MALINDA BLAND, KRISTIN DARNELL, TAMARA SPEIGHT, ERIN BACHINSKY, and ANGELA LINKOUS,	)	
Plaintiff,	)	
v.	)	Civil Case No. 7:05-cv-00521
GEORGE M. McMILLAN, SHERIFF, ROANOKE CITY SHERIFF'S OFFICE,	)	
Defendant.	)	

[Entered: October 7, 2005]

MOTION TO INTERVENE

Jennifer Donovan, Malinda Bland, Kristin Darnell, Tamara Speight, Erin Bachinsky, and Angela Linkous, and other women known and unknown, move pursuant to Fed. R. Civ. P. 24 for entry of an order permitting them to intervene as party plaintiffs, for reasons set forth in the accompanying memorandum.

Respectfully Submitted,

LESPIA J. KING, JENNIFER DONOVAN, MALINDA BLAND, KRISTIN DARNELL, TAMARA SPEIGHT, ERIN BACHINSKY, and ANGELA LINKOUS,

By /s/ Terry N. Grimes
Of Counsel

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(540) 345-6572 *Facsimile*
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically sent on the 7th of October, 2005, to Elizabeth K. Dillon, Esquire, Guynn Memmer & Dillon, 415 S. College Avenue, Salem, Virginia 24153, counsel for defendant.

/s/ Terry N. Grimes
Terry N. Grimes

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

LESPIA J. KING, JENNIFER DONOVAN, MALINDA BLAND, KRISTIN DARNELL, TAMARA SPEIGHT, ERIN BACHINSKY, and ANGELA LINKOUS,	)	
Plaintiff,	)	
v.	)	Civil Case No. 7:05-cv-00521
GEORGE M. McMILLAN, SHERIFF, ROANOKE CITY SHERIFF'S OFFICE,	)	
Defendant.	)	

[Entered: October 7, 2005]

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

Jennifer Donovan, Malinda Bland, Kristin Darnell, Tamara Speight, Erin Bachinsky, and Angela Linkous, and have filed herein a motion to intervene in this action, and in support thereof state as follows:

Plaintiff Lespia J. King has filed herein a suit for gender discrimination and sexual harassment

and constructive discharge and assault and battery pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*, and the common law of Virginia. Discovery has not yet commenced, but the investigation conducted to date indicates that many female employees have also been harassed by the Sheriff, and those persons should be permitted to participate as party plaintiffs in this action.

Federal courts have traditionally permitted intervention under the circumstances presented here. In Foster v. Gueory, 655 F.2d 1319, 1323 (D.C. Cir. 1981), for example, the appellate court held that intervenors need not satisfy the jurisdictional requirements if their asserted claims "are so similar to those asserted by the original plaintiffs that no purpose would be served by requiring [them] to file independent...charges with [the] EEOC." *See also*, Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968). More recently in Winbush v. Iowa by Glenwood State Hospital, 666 F.3d 1471, 1478 (8th Cir. 1995), the Eighth Circuit held that an intervenor need not independently satisfy the jurisdictional prerequisite of filing an EEOC charge if the intervenor's claims have a "similar and sufficient factual basis" to those of the original plaintiffs.

Such circumstances are presented here; all of the women indicated have reported inappropriate sexual comments or touching by Sheriff McMillan highly similar to that alleged by the lead plaintiff in the complaint, as follows.

Jennifer Donovan

Jennifer Donovan worked as the public information officer for Sheriff McMillan from approximately January through October 2002 when she resigned because of sexual harassment from the Sheriff and a hostile work environment.

The problem with Sheriff McMillan began during Donovan's job interview. During the interview the Sheriff kept the door closed. The interview lasted several hours and during the interview the Sheriff made several odd comments. For example, the Sheriff stated that the public information officer was like his mistress. He also stated that they would become best friends, and that they would become closer than spouses. He also stated that lots of people would talk about how close their relationship would become. He also inquired concerning her personal life and asked if her husband was the jealous type. Despite some reservations she took the job. Donovan was young at the time having graduated from college in 2000.

After her employment began the Sheriff frequently made offensive sexual remarks and touched Donovan in ways that made her uncomfortable. For example, many times when she spoke with the Sheriff in his office, he patted his though and asked her to sit on his lap. He also stated that there had been quite a bit of competition for her job, and that he did not hire one girl in particular even though she had "bigger tits" than Donovan. Donovan believes the Sheriff made this comment in April 2002 when they were at a conference in Richmond.

On another occasion in September 2002, Donovan and the Sheriff were at a conference in Virginia Beach when the Sheriff commented on the "pretty girls" in the area. On another occasion, the Sheriff discussed in some detail the fact that his son was being fitted for an athletic cup and made reference to penis size.

The Sheriff also touched Donovan in ways that made her uncomfortable. On one occasion in particular, the Sheriff put his hand on Donovan's lower back. When she complained, he told her that she was being unreasonable. After she complained the Sheriff became increasingly distant toward Donovan. He began planning meetings without her and criticizing her performance. The Sheriff also frequently touched her arm when speaking with her, and on one occasion in particular, he touched her upper arm in a way that made her skin crawl as his fingers brushed her left breast as he held her arm.

The work environment became increasingly hostile. On or about September 6, 2002, the Sheriff stated that he was "not comfortable with Donovan" or words to that effect. He also stated that he "may not keep her," or words to that effect. Donovan resigned shortly thereafter because of the harassment and hostile working environment (Ex. 1).

Kristin Darnell

Kristin Darnell worked for Sheriff McMillan on two occasions from January 2001 until August 2002 when she resigned because of Sheriff McMillan's sexual comments and touching.

Darnell first applied with the Sheriff in December 2000 and was hired to work in the jail beginning January 2001. She was 18 years old at the time and had just graduated from high school several months earlier. During her interview the Sheriff told her that she was among the first 18-year-olds he had hired. He told her that he was a very "touchy, feely person," and that if she "enjoyed that," maybe they could "end up having sex," or words to that effect. The comments made her uncomfortable but she took the job because she was just out of high school and needed a good-paying job. During the approximately four months Darnell worked for the Sheriff the first time, he hugged her frequently and patted her on the buttocks. He also told her that she was very pretty; that she would make someone very happy someday; and that he wished "it were him," or words to that effect. Darnell left the Sheriff's office in April 2001 and moved to Florida.

She returned to Roanoke in January 2002 and spoke with the Sheriff about getting her job back. The Sheriff told her that she was very special and that he did not "do that" for a lot of people. He made it clear that if he had her back, he would be doing her a favor. Darnell took the job despite her reservations.

The Sheriff harassed Darnell frequently thereafter and found most any excuse to get her into his office. On one occasion he fussed at her for not wearing a gun in public (she was not certified to carry a gun at the time). After the Sheriff fussed at her for not wearing a gun in public, he told her that there is "something you can do to make it up; come here and

give me a hug." He also told her that she could "sleep with him to make it up," or words to that effect.

After that Darnell could not take it any more. She continued to work for the Sheriff while trying to find some way out of the office and find other work. The Sheriff continued to harass her. He made comments to her and hugged her or patted her on the buttocks. He also asked her about her relationships with men and told her, "you are not allowed to have a boyfriend," or words to that effect. Darnell left the Sheriff's office for the last time in August 2002 due to the hostile work environment (Ex. 2).

Malinda Bland

Malinda Bland worked for Sheriff McMillan for about a week in August 2004. She quit her job because of Sheriff's McMillan's highly offensive sexual comments and touching.

The problem with Sheriff McMillan began during Bland's interview with him. He interviewed her in his office one day behind a closed door and made comments to her such as, "your eye are so beautiful," or words to that effect. As the interview progressed, the Sheriff inched his chair close to hers. He put his hand on her leg and stated, "I'm just friendly," or words to that effect. He told her that he knew that her mother had voted for Octavia Johnson (she did not know how the sheriff knew this), and he said something like, "you better know---the jail is all about politics---you have to vote for me," or words to that effect. He also told her that she had to have Lasix

surgery on her eyes, which she could not afford, and he had her sign some document.

At the time Bland interviewed with the Sheriff, she was working for Carilion Roanoke Memorial Hospital. The Sheriff started her at $33,000, which was a substantial pay increase, and which she believed was a higher starting salary than that paid to most new deputies.

After her employment began, the Sheriff found a great many reasons to call her into his office. When she went to the office as requested, the Sheriff would grab her buttocks or the side of her body or pull her unto his lap. The Sheriff also told her that he liked big breasts, and he told her that she had a "nice butt," or words to that effect. The Sheriff's actions made her feel terribly uncomfortable.

On another occasion, the Sheriff walked Bland to the locker area and asked her about her money situation and stated, "I want you to know that I take care of my girls. You're not going to have to want for anything," or words to that effect. He also said, "I've got money. I'll take care of you," or words to that effect. As he talked, he took a $100 dollar bill from a roll of bills and slid the bill into the pocket of her pants. The Sheriff said something about providing money to her "as long as you will come into my office and let me feel you up from time to time," or words to that effect.

That evening the Sheriff called Donovan to his office and told her to have a seat. The Sheriff told her that one of the judges had stated that she had

prostituted herself for him in the courthouse that day, and that the judge did not want her to be in his courtroom. At some point during this conversation, the Sheriff reached toward her and tightened her belt. The Sheriff also told her at some point that other girls in the past had filed grievances against him. He told her that the grievances went nowhere because "I am the sheriff. I am god," or words to that effect. The Sheriff also told her that the buck stopped with him.

Bland could not take the Sheriff's comments and touching any longer and went home that day and cried. The next day she went to her parents' home and told her father and mother what had happened to her. On Monday morning, Donovan and her mother went to the Sheriff's department to drop off her work-related property there. Bland never returned to the Sheriff's office (Ex. 3).

Angela Linkous

Angela Linkous worked at the Roanoke City jail in the medical department for Prison Heath Systems from approximately August 2001 until February 2003. While there the Sheriff and other male deputies made inappropriate sexual remarks to her. For example, the Sheriff asked Linkous to go out on a date with him and told her that if she would do so then he would purchase a desk for her. The Sheriff also told her that she was attractive and pulled her toward him and hugged her on many occasions. The inappropriate comments and touching made Linkous uncomfortable, and the work environment became so hostile that she dreaded

going to work. By February 2003, she could not take it any more and resigned (Ex. 4).

Erin Bachinsky

Erin M. Bachinsky was a graduate student at Radford University when she applied in 2002 for the position of the Sheriff's public information officer. Although she arrived at the appointed time for the interview about 11:00 a.m., she did not meet with the Sheriff until about 4:45 p.m. that afternoon, which seemed odd to Bachinsky because the office was closing; everyone was leaving; and she was called back in to a locked area to meet with the Sheriff.

When she meet the Sheriff, he spent little time asking about her qualifications and began instead asking personal questions. For example he inquired concerning her religious preferences and asked whether she would be willing to move to Roanoke (she was living in the New River Valley at the time). The Sheriff also told Bachinsky that she would become closer to him than his wife, and that she would be like his mistress. He also told her that they would become very good friends, and that she would accompany him on business trips. He told her that they would travel to very nice locations, and that she would have to pack her bathing suit. He also wanted to know whether she was involved in a romantic relationship, and he told her that she could not live with anyone before marriage. He also promised to help her find a place to live in Roanoke.

The interview lasted until about 7:30 p.m. When Bachinsky extended her hand to shake the Sheriff's hand to conclude the interview, the Sheriff instead approached Bachinsky to give her a hug. This made her uncomfortable, and she stepped back. The Sheriff then reached toward her and patted her on the shoulder. Bachinsky was so uncomfortable with the Sheriff's comments and approach that she reported his behavior to her parents, friends, and professors. The Sheriff did not hire her at the time but later called and asked whether she would be interested in the job. She declined (Ex. 5).

Tamara Speight

Tamara Speight worked as a medic in the Roanoke City jail from June 2000 through October 2001 for Prison Health Systems. On one occasion in October 2001, she happened to be in an elevator with Sheriff McMillan one evening. The Sheriff stared at her chest and stated, "I bet you drive my inmates wild with that perky chest of yours," or words to that effect. The way the Sheriff stared at her chest made her uncomfortable and afraid, and she subsequently resigned (Ex. 6).

Lespia King

The conduct described *supra* is highly similar to the conduct described in King's complaint. King alleges that she went to work for Sheriff George M. McMillan and the Roanoke City Sheriff's Office in August 2000 as a deputy in the Roanoke City jail. From about January 2003 until she resigned in March 2004, Sheriff McMillan sexually harassed

King and other female employees and permitted a hostile and offensive work environment to exist which resulted in her resignation in March 2004.

For example, shortly after King began work, while at the gun range the Sheriff insisted on "helping" King put a gun belt on her waist, touching her waist during the process and causing her to feel uncomfortable. Thereafter, on several occasions when Sheriff McMillan encountered King at work he embraced her and pulled her toward him. As he did so his hands slid toward her buttocks and lingered there until she pulled away. This unwanted touching occurred several times a year during King's employment.

On one occasion in January 2003 King me with Sheriff McMillan to request a transfer from one shift to another. King had heard that the Sheriff was "hands on" with female employees and therefore dressed conservatively. The Sheriff closed the door to his office and moved his chair next to King's and kept her in his office for nearly an hour while the Sheriff questioned King about her personal life, particularly about dating another employee. The Sheriff talked with King about her "future" and told her "you're going to have to make a choice, G--- [the other employee] or me." The Sheriff also told her that she was a very attractive you woman, "very special," and that he liked her hair. Toward the end of the conversation, the Sheriff asked King to sit on his lap. She protested, and at the end of the meeting, the Sheriff stated that he wanted a kiss. King left the office feeling humiliated and vowed

that she would attempt to limit her contact with the Sheriff to the extent possible.

On another occasion in October 2003, King attended a Western Regional Jail Association dinner at the Clarion Hotel in Roanoke. Sheriff McMillan and other deputies were present. When King greeted Sheriff McMillan, he wanted to give her a hug. When she attempted to step away, Sheriff McMillan continued to hold on to her hip and buttocks. Sheriff McMillan stated, "I'm going to hold on to you until G--- [the other employee] notices and gets jealous," or words to that effect. King tried to get away, but the Sheriff held on tightly and made other comments about the male deputy. King eventually broke away from the Sheriff.

The next day at work, a captain in the Sheriff's office pulled King aside and told her that Sheriff McMillan had been a little intoxicated at the function and was "just feeling very good," or words to that effect. King was humiliated by the incident and heard several comments from other deputies about the Sheriff's behavior with King and other female deputies.

On March 10, 2004, King was working midnight shift when Sheriff McMillan stayed late at work one evening. By that time King could not endure the harassment and hostile environment any longer and had placed an application with another employer. Sheriff McMillan apparently learned that King planned to leave when a background investigator contacted the Sheriff's office. At about 10:00 p.m. that evening, the Sheriff asked to speak

with King in the jail conference room. Sheriff McMillan told King she had a "wonderful career" ahead of her in his department if she would just "put her time in" or words to that effect. As the conversation continued, Sheriff McMillan told King that if she "broke up" with her boyfriend, then she would be able to "go places" with the Sheriff's office. The Sheriff tried to persuade King to reconsider resigning and told her she was a good worker and very intelligent; stated repeatedly that she was "a very attractive young woman," or words to that effect; told her how good her legs looked when she had worn a skirt at the Western Regional Jail Association dinner in October; told her that he liked her hair; and stated that if he "were a few years younger, you would be dating me instead of G---" or words to that effect. King tried to deflect the conversation and reminded the Sheriff that he was married. Toward the end of the conversation, the Sheriff asked for a hug. As King stood up, the Sheriff pulled her down until his lap to give her a hug. The Sheriff then told King that he wanted a kiss. When King gave the Sheriff a peck on the check as requested, he told her that "wasn't a real kiss," or words to that effect. King fled the conference room and hid in a bathroom until the Sheriff was gone and cried. King turned in her two-week notice on March 19, 2004.

Intervention under the circumstances is appropriate because all of the intervenors' claims have a "similar and sufficient factual basis to those described in the original complaint. *See* Winbush, 666 F.3d at 1478. Further, the above-described evidence is probative of factual questions, to all of

the intervenors' claims, this is, whether it existed during the reign of Sheriff McMillan a hostile work environment that was charged with inappropriate sexual comments and touching; whether the Sheriff maintained and enforced a functional anti-harassment policy; whether the Sheriff took any steps to prevent sexual harassment in the workplace; and whether the Sheriff ever imposed any discipline upon himself and other persons who violated the Sheriff's anti-harassment policy. The district court should therefore permit intervention. Further, the intervention is in the interest of judicial economy as it presents the most expedient means of adjudicating the intervenors' common claims. Pursuant Fed. R. Civ. P. 24(c), plaintiff files herewith a proposed amended complaint setting forth the claims for which intervention is sought (Ex. 7).

WHEREFORE, plaintiffs Lespia J. King, Malinda Bland, Kristin Darnell, Tamara Speight, Erin Bachinsky, and Angela Linkous request entry of an order permitting intervention and the filing of an amended complaint.

Respectfully Submitted,

LESPIA J. KING, JENNIFER DONOVAN, MALINDA BLAND, KRISTIN DARNELL, TAMARA SPEIGHT, ERIN BACHINSKY, and ANGELA LINKOUS,

By /s/ Terry N. Grimes
Of Counsel

Terry N. Grimes, Esquire (VSB#24127)
FRANKLIN COMMONS
320 Elm Avenue, SW
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(540) 982-3711
(540) 345-6572 *Facsimile*
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically sent on the 7th of October, 2005, to Elizabeth K. Dillon, Esquire, Guynn Memmer & Dillon, 415 S. College Avenue, Salem, Virginia 24153, counsel for defendant.

/s/ Terry N. Grimes
Terry N. Grimes

EXHIBIT 1

DECLARATION OF JENNIFER DONOVAN

I, Jennifer Donovan, states and affirm as follows:

(1) My name is Jennifer Donovan. I worked as the public information officer for Sheriff McMillan from approximately January through October 2002 when I resigned because of sexual harassment from the Sheriff and a hostile work environment.

(2) The problem with Sheriff McMillan began during my job interview. During the interview the Sheriff kept the door closed, and the interview lasted several hours and did not finish until 6:00 p.m. During the interview the Sheriff made several odd comments. For example, the Sheriff stated that the public information officer was like his mistress. He also stated that we would become best friends, and that we would be closer than spouses. He also stated that lots of people would talk about how close our relationship would become. He also inquired concerning my personal life and asked if my husband was the jealous type. Despite some reservations, I took the job. I was young at the time having graduated from college in 2000.

(3) After my employment began the Sheriff frequently made offensive sexual remarks and touched me in a way that made me uncomfortable. For example, many times when I spoke with the

Sheriff in his office, he patted his thigh as if to invite me to sit on his lap. He also stated that there was quite a bit of competition for my job, and that he did not hire one girl in particular even though she had bigger tits than I did. I believe the Sheriff made this comment in April 2002 when we were at a conference in Richmond.

(4) On another occasion in September 2002, I believe that we were at a conference in Virginia Beach when the Sheriff commented on the "pretty girls" in the area, or words to that effect. On another occasion, the Sheriff discussed in some detail the fact that his son was being fitted for an athletic cup and made reference to penis size.

(5) The Sheriff also touched me in ways that made me feel uncomfortable. On one occasion in particular, the Sheriff put his hand on my lower back. When I complained to him, he told me that I was being unreasonable. After I complained, the Sheriff became increasingly distant toward me. He began planning meetings without me and criticized my performance. The Sheriff also frequently touched my arm when speaking with me, and on one occasion in particular, he touched my upper arm in a way that made my skin crawl because his fingers brushed my left breast as he held my arm.

(6) The work environment became increasingly hostile. On or about September 26, 2002, the Sheriff stated that he was not "comfortable with me" or words to that effect. He also stated that he "may not keep me," or words to that effect. I

resigned shortly thereafter because of the harassment and hostile working environment.

I declare under penalty of perjury that the foregoing statement is true and accurate to the best of my knowledge, information and belief.

[9/1/05]	/s/ Jennifer C. Donovan
Date	Jennifer Donovan

EXHIBIT 2

DECLARATION OF KRISTIN N. DARNELL

I, Kristin N. Darnell, state and affirm as follows:

(1) My name is Kristin N. Darnell. I worked for Sheriff McMillan on two occasions from January 2001 until August 2002 when I resigned because of Sheriff McMillan's sexual comments and touching.

(2) I first applied with the Sheriff in December 2000 and was hired to work in the jail beginning January 2001. I was 18 years old at the time and had just graduated from high school several months earlier. During my interview the Sheriff told me that I was among the first 18-year-olds he had hired. He told me that he was a very "touchy, feely person," and that if I "enjoyed that," maybe we could "end up having sex," or words to that effect. The comments made me uncomfortable, but I took the job because I was just out of high school and needed a good-paying job. During the approximately four months I worked for the Sheriff the first time, he hugged me frequently and patted me on the buttocks. He also told me that I was very pretty; that I would make someone very happy someday; and that he wished that "it were me," or words to that effect. I left the Sheriff's office in April 2001 and moved to Florida to go to school and into the reserves.

(3) I returned to Roanoke in January 2002 and spoke with the Sheriff about getting my job back. The Sheriff told me that I was very special, and that he did not "do that" for a lot of people. He made it clear that if he had me back, he would be doing me a favor. I took the job despite my reservations.

(4) The Sheriff harassed me frequently thereafter and found most any excuse to get me into his office. On one occasion he fussed at me for not wearing a gun in public (I was not certified to carry a gun at the time). After the Sheriff fussed at me for not wearing a gun in public, he told me that there is "something you can do to make it up; come here and give me a hug." He also told me that I could "sleep with him to make it up," or words to that effect.

(5) After that I could not take it any more. I continued to work for the Sheriff while trying to find some way out of the office and find other work. The Sheriff continued to harass me. He made comments to me and hugged me or patted me on the buttocks. He also asked me about my relationships with men and told me, "you are not allow to have a boyfriend," or words to that effect. I left the Sheriff's office for the last time in August 2002.

I declare under penalty of perjury that the foregoing statement is true and accurate to the best of my knowledge, information and belief.

[8-19-05]	/s/ K Darnell
Date	Kristin N. Darnell

EXHIBIT 3

DECLARATION OF MALINDA L. BLAND

I, Malinda L. Bland, state and affirm as follows:

(1) My name is Malinda L. Bland. I worked for Sheriff McMillan for about a week in August 2004. I quit my job because of Sheriff's McMillan's highly offensive sexual comments and touching.

(2) The problem with Sheriff McMillan began during my interview with him. He interviewed me in his office one day behind a closed door. He made comments to me such as, "your eye are so beautiful," or words to that effect. As the interview progressed, he inched his chair close to mine. He put his hand on my leg and stated, "I'm just friendly," or words to that effect. He told me that he knew that my mother had voted for Octavia Johnson (I do not know how the sheriff knew this), and he said something like, "you better know---the jail is all about politics---you have to vote for me," or words to that effect. He also told me that I had to have Lasix surgery on my eyes, which I could not afford, and he had me sign some document.

(3) At the time I interviewed with the Sheriff, I was working for Carilion Roanoke Memorial Hospital. The Sheriff started me at $33,000, which was a substantial pay increase, and which I believe was a higher starting salary than that paid to most new deputies.

(4) After my employment began, the Sheriff found a great many reasons to call me into his office. When I went to the office as requested, the Sheriff would grab my buttocks or the side of my body or pull me unto his lap. The Sheriff also told me that he liked big breasts, and he told me that I had a "nice butt," or words to that effect. The Sheriff's actions made me feel terribly uncomfortable.

(5) On one occasion, the Sheriff walked me to the locker area and asked me about my money situation and stated, "I want you to know that I take care of my girls. You're not going to have to want for anything," or words to that effect. He also said, "I've got money. I'll take care of you," or words to that effect. As he talked, he took a $100 dollar bill from a roll of bills and slid the bill into the pocket of my pants. The Sheriff said something about providing money to me "as long as you will come into my office and let me feel you up from time to time," or words to that effect. We then proceeded to the locker area, and we later went to my assigned duty in the courthouse.

(6) That evening the Sheriff called me to his office and told me to have a seat. The Sheriff told me that one of the judges has stated that I had prostituted myself to him in the courthouse that day, and that the judge did not want me to be in his court room. At some point during this conversation, the Sheriff reached toward me and tightened my belt.

(7) The Sheriff also told me at one point that there had been girls in the past that had filed

grievances against him. He told me that the grievances went nowhere because "I am the sheriff. I am god," or words to that effect. The Sheriff told me that the buck stopped with him.

(8) I could not take the Sheriff's comments and touching any longer, and I went home and cried. The next day I went to my parents' home and told my father and mother what had happened to me. On Monday morning, my mother and I went to the Sheriff's department to drop off my work related property there. I never went back to the Sheriff's office.

I declare under penalty of perjury that the foregoing statement is true and accurate to the best of my knowledge, information and belief.

[8-19-05]	/s/ Malinda Bland
Date	Malinda L. Bland

EXHIBIT 4

DECLARATION OF ANGELA LINKOUS

I, Angela Linkous, state and affirm as follows:

(1) My name is Angela Linkous. I worked at the Roanoke City jail in the medical department for Prison Health Systems from about August 2001 until February 2003.

(2) While there Sheriff McMillan and other male deputies made sexual remarks and did other things that made me terribly uncomfortable. For example, Sheriff McMillan asked me to go out on a date with him, and he told me that if I would go out on a date with him then he would buy a new desk for me. The Sheriff told me how attractive I was, and he pulled me toward him and hugged me many times.

(3) All of this made me uncomfortable, and it got to the point that I dreaded going to work. By February 2003, I could not take it anymore and resigned.

I declare under penalty of perjury that the foregoing statement is true and accurate to the best of my knowledge, information and belief.

[9-30-05]
Date

/s/ Angela Linkous
Angela Linkous

EXHIBIT 5

DECLARATION OF ERIN M. BACHINSKY

I, Erin M. Bachinsky, state and affirm as follows:

(1) My name is Erin M. Bachinsky. While I was in graduate school at Radford University in the Corporate and Professional Communications Department, I applied in 2002 for the position of chief communications officer for the Sheriff of the City of Roanoke. An interview was scheduled in March 2002, I believe.

(2) I arrived for the interview around 11:00 a.m., and I was told that the interview would include a lie detector test, a tour of the jail, and a meeting with the Sheriff. I took the lie detector test and was kept there all afternoon and did not meet with the Sheriff until about 4:45 p.m.

(3) At about that time the Sheriff called me into his office. This seemed odd to me because it was late in the day, and I had already been there since about 11:00 a.m. that morning. The office was closing; everyone was leaving; and I was called back into a locked area to meet with the Sheriff.

(4) When I met Sheriff McMillan, he spent little time asking about my qualifications and began instead asking personal questions. For example, he asked about my religious preferences and whether I would be willing to move to Roanoke (I was living in the New River Valley at the time). He also told me

that I would become closer to him than his wife, and that I would be like his mistress. He told me that we would become very good friends, and that I would accompany him on business trips. He also told me that we would travel to very nice locations, and that I would have to pack my bathing suit. He also wanted to know whether I was involved in a romantic relationship, and he told me that I could not live with anyone before marriage. He also told me that he would help me find a place to live in Roanoke.

(5) The interview lasted until about 7:30 p.m. As the interview ended, I extended my hand to shake the Sheriff's hand and conclude the interview. The Sheriff instead approached me to give me a hug. This made me uncomfortable, and I stepped back. The Sheriff then reached toward me and patted me on the shoulder.

(6) I was terribly uncomfortable with the Sheriff's comments and approach during the interview. After leaving the office and in the safety of my car, I began to get even more upset and began calling my parents, friends, and professors to discuss what transpired and whether this was the type of behavior I might expect from a job interview in the future.

(7) The sheriff did not hire me but at a later time called and asked whether I would be interested in the job. I declined.

I declare under penalty of perjury that the foregoing statements are true and accurate to the best of my knowledge, information and belief.

[9-27-05]	/s/ Erin M. Bachinsky
Date	Erin M. Bachinsky

EXHIBIT 6

DECLARATION OF TAMARA D. SPEIGHT

I, Tamara D. Speight, state and affirm as follows:

(1) My name is Tamara D. Speight. From approximately June 2000 through October 2001, I worked for Prison Health Systems at the Roanoke City jail. I believe that my employer had a contract with the Roanoke City Sheriff's Department to provide certain healthcare services to inmates at the jail. I worked as a medication aide.

(2) On one occasion in October 2001, I happened to be in an elevator with Sheriff McMillan at around 6:15 p.m. one evening. He and I were the only persons in the elevator at the time.

(3) Sheriff McMillan stared at my chest and stated, "I bet you drive my inmates wild with that perky chest of yours," or words to that effect. I said something like, "well, that's not my intention." The way the Sheriff stared at my chest made me terribly uncomfortable and afraid. I never once had given the Sheriff any reason to think that he could talk to me that way.

(4) I was so upset by the incident and I quit my job thereafter. I reported the incident to my supervisor, who told me never to mention the matter again because the Sheriff bent over backwards for the medical department. What the Sheriff said to

me in the elevator, and the way he stared at me, bothers me to this day.

I declare under penalty of perjury that the foregoing statements are true and accurate to my knowledge, information and belief.

[9-27-2005]	/s/ Tamara D. Speight
Date	Tamara D. Speight

EXHIBIT 7

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

LESPIA J. KING, JENNIFER DONOVAN, MALINDA BLAND, KRISTIN DARNELL, TAMARA SPEIGHT, ERIN BACHINSKY, and ANGELA LINKOUS,	)	
Plaintiffs,	)	
v.	)	Civil Case No. 7:05CV00521
GEORGE M. McMILLAN, SHERIFF, ROANOKE CITY SHERIFF'S OFFICE,	)	
Defendant.	)	

AMENDED COMPLAINT

Plaintiffs Lespia J. King, Jennifer Donovan, Malinda Bland, Kristin Darnell, Tamara Speight, Erin Bachinsky, and Angela Linkous, move for judgment against defendant George M. McMillan, Sheriff, Roanoke City Sheriff's Office ("Sheriff"), and as grounds therefore state as follows:

(1) This is suit for gender discrimination and sexual harassment and constructive discharge and assault and battery authorized and instituted

pursuant to Title VII of the Civil Right Act of 1964, 42 U.S.C. §§2000e, *et seq.* and the common law of Virginia.

(2) This Court has jurisdiction pursuant to 42 U.S.C. §2000e-5(f) and 28 U.S.C. §1343(4).

(3) Lead plaintiff Lespia J. King timely filed her charge with the Equal Employment Opportunity Commission and the Virginia Council on Human Rights; received a notice of right to sue dated June 8, 2005; and files this action within 90 days of receipt of the notice of right to sue.

(4) All plaintiffs are female residents of the Commonwealth of Virginia or other states.

(5) On information and belief, the Sheriff is a constitutional official duly elected pursuant to the law of the Commonwealth of Virginia. At all times material hereto, the Sheriff employed more than 200 persons.

i. Lespia J. King

(6) King went to work for Sheriff George M. McMillan and the Roanoke City Sheriff's Office in August 2000 as a deputy in the Roanoke City Jail. From about January 2003 until she resigned March 2004, Sheriff McMillan sexually harassed King and other female job applicants, and regular and contact employees and permitted a hostile and offensive work environment to exist which resulted in King's resignation in March 2004.

(7) For example, shortly after King began work, while at the gun range the Sheriff insisted on "helping" her put a gun belt on her waist, touching her waist during the process and causing her to feel uncomfortable.

(8) Thereafter when Sheriff McMillan encountered King at work, he on several occasions embraced her and pulled her toward him. As he did so, his hands slid toward her buttocks and lingered there until she pulled away. This unwanted touching occurred several times a year during King's employment.

(9) On another occasion in January 2003 King met with Sheriff McMillan to request a transfer from one shift to another. King had heard that the Sheriff was "hands on" with female employees and therefore dressed conservatively. The Sheriff closed the door to his office and moved his chair next to King's and kept her in his office for nearly an hour while the Sheriff questioned King about her personal life, particularly about dating another employee. The Sheriff talked with King about her "future" and told her "you're going to have to make a choice, G--- [the other employee] or me." The Sheriff also told King that she was a very attractive young woman, "very special," and that he liked her hair. Toward the end of the conversation, the Sheriff asked King to sit on his lap. She protested, and at the end of the meeting, the Sheriff stated that he wanted a kiss. King left the office feeling humiliated and vowed that she would attempt to limit her contact with the Sheriff to the extent possible.

(10) On another occasion in October 2003, King attended a Western Regional Jail Association dinner at the Clarion Hotel in Roanoke. Sheriff McMillan and other deputies were present. When King greeted Sheriff McMillan, he wanted to give her a hug. When she attempted to step away, Sheriff McMillan continued to hold on to her hip and buttocks. Sheriff McMillan stated, "I'm going to hold on to you until G--- [the other employee] notices and gets jealous," or words to that effect. King tried to get away, but the Sheriff held on tightly and made other comments about the male deputies. King eventually broke away from the Sheriff.

(11) The next day at work, a captain in the Sheriff's office pulled King aside and told her that Sheriff McMillan had been a little intoxicated at the function and was "just feeling very good," or words to that effect. King was humiliated by the incident and heard several comments from other deputies about the Sheriff's behavior with King and other female deputies.

(12) On March 10, 2004, King was working midnight shift when Sheriff McMillan stayed late at work one evening. By that time King could not endure the harassment and hostile environment any longer and had placed an application with another employer. Sheriff McMillan apparently learned that she planned to leave when a background investigator contacted the Sheriff's office. At about 10:00 p.m. that evening, the Sheriff asked to speak with King in the jail conference room. Sheriff McMillan told King she had a "wonderful career" ahead of her in his department if she would just "put her time in" or

words to that effect. As the conversation continued, Sheriff McMillan told King that if she "broke up" with her boyfriend, then she would be able to "go places" with the Sheriff's office. The Sheriff tried to convince King to reconsider resigning and told her she was a good worker and very intelligent; stated repeatedly that she was "a very attractive young woman," or words to that effect; told her how good her legs looked when she had worn a skirt at the Western Regional Jail Association dinner in October; told her that he liked her hair; and stated that if he "were a few years younger, you would be dating me instead of G---" or words to that effect. King tried to deflect the conversation and reminded the Sheriff that he was married. Toward the end of the conversation, the Sheriff asked for a hug. As King stood up, the Sheriff pulled her down unto his lap to give her a hug. The Sheriff then told King that he wanted a kiss. When she gave the Sheriff a peck on the cheek as requested, he told her that "wasn't a real kiss," or words to that effect. King fled the conference room and hid in a bathroom until the Sheriff was gone and cried. King turned in her two-week notice on March 19, 2004.

(13) King thereafter filed a charge of discrimination with the Equal Employment Opportunity Commission, which documentation contains further details.

(14) King resigned her employment as a result of the continued pattern of sexual harassment and the maintenance of a hostile and offensive work environment.

ii. Jennifer Donovan

(15) Jennifer Donovan worked as the public information officer for the Sheriff from approximately January through October 2002 when she resigned because of sexual harassment by the Sheriff and a hostile work environment.

(16) During Donovan's job interview, the Sheriff made several odd comments. The Sheriff stated that the public information officer was like his mistress. He also stated that he and Donovan would become best friends and that they would be closer than spouses. He also stated that lots of people would talk about how close their relationship would become. He also inquired concerning Donovan's personal life and asked her if her husband was the jealous type. Despite some reservations, Donovan accepted the job. She was very young at the time having graduated from college in 2000.

(17) After Donovan's employment began, the Sheriff frequently made offensive sexual remarks and touched her in ways that made her uncomfortable. For example, many times when she spoke with the Sheriff in his office, he patted his thigh as if to invite her to sit on his lap. He also stated that there had been quite a bit of competition for her job, and that he did not hire one girl in particular even though she had bigger tits than Donovan's.

(18) On another occasion Donovan and the Sheriff were at a conference with other persons in Virginia Beach when the Sheriff commented on the

"pretty girls" in the area, or words to that effect. On another occasion, the Sheriff discussed in some detail the fact that his son had been fitted for an athletic cup and made reference to his penis size.

(19) The Sheriff also touched Donovan in ways that made her uncomfortable. On one occasion in particular, the Sheriff put his hand on Donovan's lower back. When she complained to him, the Sheriff responded that she was being unreasonable. After she complained, the Sheriff became increasingly distant toward Donovan. He began planning meetings without her and criticized her performance. The Sheriff also frequently touched her armed when speaking with her, and on one occasion in particular, the Sheriff touched Donovan's upper arm in a way that made her skin crawl because his fingers brushed her left breast as he held her arm.

(20) The work environment became increasingly hostile, and on or about September 6, 2002, the Sheriff told Donovan that he was not "comfortable with her" or words to that effect. He also stated that he "may not keep her," or words to that effect. Donovan resigned shortly thereafter because of the harassment and hostile work environment.

iii. Tamara Speight

(21) Tamara Speight worked in the Roanoke City jail for Prison Health Systems from approximately June 2000 through October 2001. On information and belief, Prison Health Systems had a

contract with the Sheriff's department to provide certain healthcare services to inmates at the jail, and Speight worked as a medication aide.

(22) On one occasion in October 2001, Speight happened to be in an elevator with Sheriff McMillan one evening. While in the elevator, McMillan stared at Speight's chest and stated, "I bet you drive my inmates wild with that perky chest of yours," or words to that effect. The Sheriff's comment and the way he stared at Speight made her terribly uncomfortable and afraid, and she resigned shortly thereafter.

iv. Malinda Bland

(23) Malinda Bland worked for the Sheriff for about a week in August 2004 until she resigned because of the Sheriff's offensive sexual comments and touching.

(24) For example, during her interview the Sheriff made inappropriate comments such as "your eyes are so beautiful," or words to that effect. As the interview progressed, the Sheriff moved his chair closer and closer to Bland's chair. The Sheriff put his hands on Bland's leg and stated, "I'm just friendly," or words to that effect. The Sheriff also made certain political comments and told Bland that she had to have Lasix surgery on her eyes. She could not afford the surgery but had it anyway.

(25) After Bland's employment began, the Sheriff found many reasons to call Bland into his office. When she went to the office as requested, the

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Sheriff grabbed her buttocks or the side of her body to pull her onto his lap. The Sheriff also told Bland that he liked big breasts, and he told Bland that she had a "nice butt," or words to that effect. The Sheriff's conduct made Bland terribly uncomfortable.

(26) On another occasion the Sheriff walked Bland to the locker area and asked her about her money situation and stated, "I want you to know that I take care of my girls. You're not going to have to want for anything," or words to that effect. He also stayed, "I've got money. I'll take care of you," or words to that effect. As he talked, he took a one hundred dollar bill from the roll of bills in his hand and slid the bill into the pocket of Bland's pants. The Sheriff also said something about providing money to Bland "as long as you will come into my office and let me feel you up from time to time," or words to that effect.

(27) Later that evening the Sheriff called Bland to his office and told her that one of the judges in the Roanoke City courthouse had stated that Bland had prostituted herself in the courthouse that day. This was not true, and at some point during the conversation, for some reason the Sheriff reached toward Bland and tightened her belt.

(28) The Sheriff also told Bland at one point that other women in the past had filed grievances against him, but that the grievances went nowhere because, according to the Sheriff, "I am the Sheriff. I am god," or words to that effect. The Sheriff also told Bland that the buck stopped with him.

(29) Although Bland had only worked for the Sheriff for about a week, she could not endure the comments any longer, and went home and cried. She reported what had happened to her parents and resigned shortly thereafter as a result of the offensive sexual comments and touching and hostile work environment.

v. Kristin Darnell

(30) Kristin Darnell worked for the Sheriff on two occasions from January 2001 until 2002 when she resigned because of the Sheriff's offensive sexual comments and touching.

(31) Darnell first applied with the Sheriff in December 2000 and was hired to work in the jail beginning January 2001. Darnell was 18 years old at the time and had just graduated from high school several months earlier. During her interview the Sheriff told Darnell that she was among the first 18-year-olds he had hired. He also told her that he was a very "touchy, feely person," and that if she "enjoyed that," maybe the Sheriff and Darnell could "end up having sex," or words to that effect. The comments made Darnell uncomfortable, but she took the job because she was just out of high school and needed a good-paying job.

(32) During the next four months the Sheriff hugged Darnell frequently and patted her on the buttocks. He also told her that she was very pretty; that she would make someone very happy someday; and that he wished that "it were him," or words to

that effect. Darnell left the Sheriff's office on April 2001 and moved to Florida for a period of time.

(33) Darnell returned to Roanoke in January 2002 and spoke with the Sheriff about getting her job back. The Sheriff told her that she was very special and that he did not "do that" for a lot of people but that he would do it for her. The Sheriff made it clear that if he hired Darnell a second time, then he would be doing her a favor. Darnell had reservations but took the job.

(34) Thereafter the Sheriff harassed Darnell frequently and found most any excuse to get her into his office. For example on one occasion the Sheriff fussed at Darnell for not wearing a gun in public (she was not certified to carry a gun at the time). After the Sheriff fussed at Darnell, he told her that there is "something you can do to make it up; come here and give me a hug," or words to that effect. He also told her that she could "sleep with him to make it up," or words to that effect.

(35) Darnell could not take the harassment any longer and began to try to find some way out of the Sheriff's office to find other work. The Sheriff continued to harass Darnell and made inappropriate comments to her and hugged her or patted her on the buttocks. The Sheriff also asked Darnell about her relationships with men and told her, "you are not allowed to have a boyfriend," or words to that effect. Darnell resigned in August 2002 as a result of the hostile work environment.

vi. Erin Bachinsky

(36) Erin Bachinsky was in graduate school at Radford University when she applied in 2002 for the position of chief communication officer for the Sheriff. An interview was scheduled about March 2002.

(37) Bachinsky arrived for the interview at about 11:00 a.m. but did not meet with the Sheriff until about 4:45 p.m., when the Sheriff called Bachinsky into his office. This seemed odd to Bachinsky because it was late in the day; she had been there since about 11:00 a.m. that morning; the office was closing; everyone was leaving; and she was called into a locked area to meet with the Sheriff.

(38) When Bachinsky met the Sheriff, he spent little time asking about her qualifications and focused instead on personal matters. For example, the Sheriff asked Bachinsky about her religious preferences and asked whether she would be willing to move to Roanoke (she was living in the New River Valley at the time). The Sheriff also told Bachinsky that she would become closer to him than his wife, and that she would be like his mistress. He also told her that they would become very good friends, and that she would accompany him on business trips. He also told her that they would travel to very nice locations, and that she would have to pack her bathing suit. He also inquired whether she was involved in a romantic relationship, and he told her that she could not live with anyone before marriage. He also stated that he would help her find a place to live in Roanoke.

(39) The interview lasted until about 7:30 p.m. As Bachinsky extended her hand to shake the Sheriff's hand to conclude the interview, the Sheriff instead moved toward Bachinsky to give her a hug. This was not appropriate and alarmed Bachinsky, and she stepped back. The Sheriff then reached toward Bachinsky and patted her on the shoulder. Bachinsky later reported the incident to family and friends. The Sheriff di . not offer Bachinsky the job at the time but later asked whether she would be interested in the job. She declined.

vii. Angela Linkous

(40) Angela Linkous worked at the Roanoke City jail in the medical department for Prison Health Systems from about August 2001 until February 2003. While there the Sheriff and other male deputies made inappropriate sexual remarks and did other things that created a hostile work environment. For example, the Sheriff asked Linkous to go out on a date with him, and he told her that if she would do so, the he would purchase a new desk for her. The Sheriff also told Linkous how attractive she was, and he pulled her toward him and hugged her on many occasions.

(41) The inappropriate sexual comments and touching made Linkous quite uncomfortable, and the environment became so hostile that she dreaded going to work and resigned about February 2003.

COUNT I: CLAIM FOR SEX DISCRIMINATION AND SEXUAL HARASSMENT AND CONSTRUCTIVE DISCHARGE

(42) Plaintiffs incorporates by reference herein the preceding paragraphs of this complaint.

(43) At all times material hereto, defendant had an obligation to maintain a work environment that was not charged with sexual harassment and discrimination and hostile to plaintiffs and other women.

(44) Defendant violated federal law by permitting a work environment to exist that was sexually charged and hostile and offensive to plaintiffs and other women and by constructively discharging King, Donovan, Bland, Darnell, Speight, and Linkous.

(45) As a direct and proximate result of defendant's actions, plaintiffs have suffered and will continue to suffer pecuniary loss, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other non-pecuniary loss.

(46) At all times material hereto, defendant engaged in a discriminatory practice or practices with malice or reckless indifference to the federally protected rights of the plaintiffs so as to support an award of liquidated and/or punitive damages.

(47) The above-described acts by the defendant constitute sexual harassment and sex discrimination and constructive discharge in

violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et. seq.*

COUNT II: CLAIM FOR ASSAULT AND BATTERY

(48) Plaintiffs incorporate by reference herein the preceding paragraphs of this complaint.

(49) Defendant's inappropriate and unwanted touching and related conduct with respect to King, Bland and Darnell constitutes assault and battery in violation of Virginia common law.

(50) As a direct and proximate result of defendant's conduct, the above-referenced plaintiffs have suffered and will continue to suffer pecuniary loss, pain, suffering, inconvenience, mental anguish, loss of employment of life and other non-pecuniary loss.

(51) Further, defendant acted with actual malice toward the above-referenced plaintiffs or with reckless disregard of the protected rights of the plaintiffs so as to support an award of punitive damages.

WHEREFORE, plaintiffs pray for judgment against George M. McMillan, Sheriff, Roanoke City Sheriff's Office and for equitable relief, compensatory, liquidated and punitive damages, together with prejudgment interest from the date of termination of plaintiffs' employment, and for the costs and attorney's fees, and for such other and further relief as may be just and equitable.

Trial by jury is demanded.

Respectfully Submitted,

LESPIA J. KING, JENNIFER DONOVAN, MALINDA BLAND, KRISTIN DARNELL, TAMARA SPEIGHT, ERIN BACHINSKY, and ANGELA LINKOUS,

By /s/ Terry N. Grimes
Of Counsel

Terry N. Grimes, Esquire (VSB#24127)
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(540) 982-3711
(540) 345-6572 *Facsimile*
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically sent on the 7th of October, 2005, to Elizabeth K. Dillon, Esquire, Guynn Memmer & Dillon, 415 S. College Avenue, Salem, Virginia 24153, counsel for defendant.

/s/ Terry N. Grimes
Terry N. Grimes

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

LESPIA J. KING	)	
	)	
Plaintiff,	)	
	)	Civil Case No.
v.	)	7:05-cv-00521
	)	
GEORGE M. McMILLAN, SHERIFF, ROANOKE CITY SHERIFF'S OFFICE,	)	
	)	
Defendant.	)	

[Entered: September 16, 2005]

MOTION TO CERTIFY CLASS ACTION

Pursuant to Rule 23 of the Federal Rules of Civil Procedure, Plaintiff Lespia J. King moves this Court to enter an order certifying this matter as a class action.

Plaintiff requests that the class consist of all women in the United States (except for the states of California, Nevada, Arizona and Idaho) who have been sexually harassed by George M. McMillan, Sheriff of the City of Roanoke, Virginia (the "Class"). Plaintiff also requests that the court appoint as class counsel to represent the interests of the Class Terry N. Grimes, Terry N. Grimes, Esquire, P.C. 320 Elm Avenue, SW, Roanoke, Virginia 24016.

In support of this motion, plaintiff incorporates the allegations of the complaint in this action in the attached memorandum of law submitted in support of this motion.

Respectfully Submitted,

LESPIA J. KING

By /s/ Terry N. Grimes
Of Counsel

Terry N. Grimes, Esquire (VSB#24127)
FRANKLIN COMMONS
320 Elm Avenue, SW
Roanoke, Virginia 24016-4001
(540) 982-3711/(540) 345-6572 *Facsimile*
Counsel for Plaintiff

IN THE
UNITED STATES DISTRICT COURT
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LESPIA J. KING	)	
	)	
Plaintiff,	)	
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v.	)	7:05-cv-00521
	)	
GEORGE M. McMILLAN, SHERIFF, ROANOKE CITY SHERIFF'S OFFICE,	)	
	)	
Defendant.	)	

[Entered: September 16, 2005]

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO CERTIFY CLASS ACTION

Plaintiff Lespia J. King, in support of her motion to certify class action, hereby states as follows:

I. INTRODUCTION

Plaintiff submits this memorandum of law in support of her motion to certify this lawsuit as a class action pursuant to Fed. R. Civ. P. 23. The proposed class is defined as all female employees who have been sexually harassed by George M. McMillan, Sheriff of the City of Roanoke, Virginia. Plaintiff seeks to maintain this class pursuant to

Fed. R. Civ. P. 23(b)(1)(A). In the alternative, plaintiff moves for an order certifying the class pursuant to Rule 23(b)(3).

II. FACTUAL BACKGROUND

Plaintiff has filed herein a suit for gender discrimination and sexual harassment and constructive discharge and assault and battery pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, *et seq.*, and the common law of Virginia. Plaintiff alleges that the Sheriff is a constitutional officer duly elected pursuant to the laws of the Commonwealth of Virginia, and that at all times material hereto, the Sheriff employed more than 200 persons.

Plaintiff further alleges that she went to work for Sheriff George M. McMillan and the Roanoke City Sheriff's Office in August 2000 as a deputy in the Roanoke City jail. From about January 2003 until she resigned March 2004, Sheriff McMillan sexually harassed plaintiff and other female employees and permitted a hostile and offensive work environment to exist which resulted in plaintiff's resignation in March 2004.

For example, shortly after plaintiff began work, while at the gun range the Sheriff insisted on "helping" plaintiff put a gun belt on her waist, touching her waist during the process and causing plaintiff to feel uncomfortable. Thereafter, on several occasions when Sheriff McMillan encountered plaintiff at work he embraced her and pulled her toward him. As he did so his hands slid toward her

buttocks and lingered there until she pulled away. This unwanted touching occurred several times a year during plaintiff's employment.

On one occasion in January 2003 plaintiff met with Sheriff McMillan to request a transfer from one shift to another. Plaintiff had heard that the Sheriff was "hands on" with female employees and therefore dressed conservatively. The Sheriff closed the door to his office and moved his chair next to plaintiff's and kept plaintiff in his office for nearly an hour while the Sheriff questioned plaintiff about her personal life, particularly about dating another employee. The Sheriff talked with plaintiff about her "future" and told her "you're going to have to make a choice, G--- [the other employee] or me." The Sheriff also told plaintiff that she was a very attractive young woman, "very special," and that he liked her hair. Toward the end of the conversation, the Sheriff asked plaintiff to sit on his lap. She protested, and at the end of the meeting, the Sheriff stated that he wanted a kiss. Plaintiff left the office feeling humiliated and vowed that she would attempt to limit her contact with the Sheriff to the extent possible.

On another occasion in October 2003, plaintiff attended a Western Regional Jail Association dinner at the Clarion Hotel in Roanoke. Sheriff McMillan and other deputies were present. When plaintiff greeted Sheriff McMillan, he wanted to give plaintiff a hug. When she attempted to step away, Sheriff McMillan continued to hold on to her hip and buttocks. Sheriff McMillan stated, "I'm going to hold on to you until G--- [the other employee] notices and

gets jealous," or words to that effect. Plaintiff tried to get away, but the Sheriff held on tightly and made other comments about the male deputy. Plaintiff eventually broke away from the Sheriff.

The next day at work, a captain in the Sheriff's office pulled plaintiff aside and told her that Sheriff McMillan had been a little intoxicated at the function and was "just feeling very good," or words to that effect. Plaintiff was humiliated by the incident and heard several comments from other deputies about the Sheriff's behavior with plaintiff and other female deputies.

On March 10, 2004, plaintiff was working midnight shift when Sheriff McMillan stayed late at work one evening. By that time plaintiff could not endure the harassment and hostile environment any longer and had placed an application with another employer. Sheriff McMillan apparently learned that plaintiff planned to leave when a background investigator contacted the Sheriff's office. At about 10:00 p.m. that evening, the Sheriff asked to speak with plaintiff in the jail conference room. Sheriff McMillan told plaintiff she had a "wonderful career" ahead of her in his department if she would just "put her time in" or words to that effect. As the conversation continued, Sheriff McMillan told plaintiff that if she "broke up" with her boyfriend, then she would be able to "go places" with the Sheriff's office. The Sheriff tried to convince plaintiff to reconsider resigning and told her she was a good worker and very intelligent; stated repeatedly that plaintiff was "a very attractive young woman," or words to that effect; told her how good her legs

looked when she had worn a skirt at the Western Regional Jail Association dinner in October; told her that he liked her hair; and stated that if he "were a few years younger, you would be dating me instead of G---," or words to that effect. Plaintiff tried to deflect the conversation and reminded the Sheriff that he was married. Toward the end of the conversation, the Sheriff asked for a hug. As plaintiff stood up, the Sheriff pulled her down unto his lap to give her a hug. The Sheriff then told plaintiff that he wanted a kiss. When plaintiff gave the Sheriff a peck on the cheek as requested, he told her that "wasn't a real kiss," or words to that effect. Plaintiff fled the conference room and hid in a bathroom until the Sheriff was gone and cried. Plaintiff turned in her two-week notice on March 19, 2004.

Other former female employees have experienced similar harassment. Three examples are instructive.

Jennifer Donovan

Jennifer Donovan worked as the public information officer for Sheriff McMillan from approximately January through October 2002 when she resigned because of sexual harassment from the Sheriff and a hostile work environment.

The problem with Sheriff McMillan began during Donovan's job interview. During the interview the Sheriff kept the door closed. The interview lasted several hours and during the interview the Sheriff made several odd comments. For example, the Sheriff stated that the public

information officer was like his mistress. He also stated that they would become best friends, and that they would become closer than spouses. He also stated that lots of people would talk about how close their relationship would become. He also inquired concerning her personal life and asked if her husband was the jealous type. Despite some reservations she took the job. Donovan was young at the time having graduated from college in 2000.

After her employment began the Sheriff frequently made offensive sexual remarks and touched Donovan in ways that made her uncomfortable. For example, many times when she spoke with the Sheriff in his office, he patted his thigh and asked her to sit on his lap. He also stated that there had been quite a bit of competition for her job, and that he did not hire one girl in particular even though she had "bigger tits" than Donovan. Donovan believed the Sheriff made this comment in April 2002 when they were at a conference in Richmond.

On another occasion in September 2002, Donovan and the Sheriff were at a conference in Virginia Beach when the Sheriff commented on the "pretty girls" in the area, or words to that effect. On another occasion, the Sheriff discussed in some detail the fact that his son was being fitted for an athletic cup and made reference to penis size.

As stated the Sheriff also touched Donovan in ways that made her feel uncomfortable. On one occasion in particular, the Sheriff put his hand on Donovan's lower back. When she complained, he

told her that she was being unreasonable. After she complained the Sheriff became increasingly distant toward Donovan. He began planning meetings without her and criticized her performance. The Sheriff also frequently touched her arm when speaking with her, and on one occasion in particular, he touched her upper arm in a way that made her skin crawl as his fingers brushed her left breast as he held her arm.

The work environment became increasingly hostile. On or about September 6, 2002, the Sheriff stated that he was not comfortable with Donovan" or words to that effect. He also stated that he "may not keep her," or words to that effect. Donovan resigned shortly thereafter because of the harassment and hostile working environment (Exhibit 1).

Kristin Darnell

Kristin Darnell worked for Sheriff McMillan on two occasions from January 2001 until August 2002 when she resigned because of Sheriff McMillan's sexual comments and touching.

Darnell first applied with the Sheriff in December 2000 and was hired to work in the jail beginning January 2001. She was 18 years old at the time and had just graduated from high school several months earlier. During her interview the Sheriff told her that she was among the first 18-year-olds he had hired. He told her that he was a very "touchy, feely person," and that if she "enjoyed that," maybe they could "end up having sex," or words to that effect. The comments made her

uncomfortable but she took the job because she was just out of high school and needed a good-paying job. During the approximately four months Darnell worked for the Sheriff the first time, he hugged her frequently and patted her on the buttocks. He also told her that she was very pretty; that she would make someone very happy someday; and that he wished "it were him," or words to that effect. Darnell left the Sheriff's office in April 2001 and moved to Florida.

She returned to Roanoke in January 2002 and spoke with the Sheriff about getting her job back. The Sheriff told her that she was very special and that he did not "do that" for a lot of people. He made it clear that if he had her back, he would be doing her a favor. Darnell took the job despite her reservations.

The Sheriff harassed Darnell frequently thereafter and found most any excuse to get her into his office. On one occasion he fussed at her for not wearing a gun in public (she was not certified to carry a gun at the time). After the Sheriff fussed at her for not wearing a gun in public, he told her that there is "something you can do to make it up; come here and give me a hug." He also told her that she could "sleep with him to make it up," or words to that effect.

After that Darnell could not take it any more. She continued to work for the Sheriff while trying to find some way out of the office and find other work. The Sheriff continued to harass her. He made comments to her and hugged her or patted her on

the buttocks. He also asked her about her relationships with men and told her, "you are not allowed to have a boyfriend," or words to that effect. Darnell left the Sheriff's office for the last time in August 2002 (Exhibit 2).

Malinda Bland

Malinda Bland worked for Sheriff McMillan for about a week in August 2004. She quit her job because of Sheriff s McMillan's highly offensive sexual comments and touching.

The problem with Sheriff McMillan began during Bland's interview with him. He interviewed her in his office one day behind a closed door and made comments to her such as, "your eye are so beautiful," or words to that effect. As the interview progressed, the Sheriff inched his chair close to hers. He put his hand on her leg and stated, "I'm just friendly," or words to that effect. He told her that he knew that her mother had voted for Octavia Johnson (she did not know how the sheriff knew this), and he said something like, "you better know---the jail is all about politics---you have to vote for me," or words to that effect. He also told her that she had to have Lasix surgery on her eyes, which she could not afford, and he had her sign some document.

At the time Bland interviewed with the Sheriff, she was working for Carilion Roanoke Memorial Hospital. The Sheriff started her at $33,000, which was a substantial pay increase, and which she believed was a higher starting salary than that paid to most new deputies.

After her employment began, the Sheriff found a great many reasons to call her into his office. When she went to the office as requested, the Sheriff would grab her buttocks or the side of her body or pull her unto his lap. The Sheriff also told her that he liked big breasts, and he told her that she had a "nice butt," or words to that effect. The Sheriff's actions made her feel terribly uncomfortable.

On one occasion, the Sheriff walked Bland to the locker area and asked her about her money situation and stated, "I want you to know that I take care of my girls. You're not going to have to want for anything," or words to that effect. He also said, "I've got money. I'll take care of you," or words to that effect. As he talked, he took a $100 dollar bill from a roll of bills and slid the bill into the pocket of her pants. The Sheriff said something about providing money to her "as long as you will come into my office and let me feel you up from time to time," or words to that effect. They then proceeded to the locker area, and they later went to her assigned duty in the courthouse.

That evening the Sheriff called her to his office and told her to have a seat. The Sheriff told her that one of the judges had stated that she had prostituted herself to him in the courthouse that day, and that the judge did not want her to be in his court room. At some point during this conversation, the Sheriff reached toward her and tightened her belt. The Sheriff also told her at one point that there had been girls in the past who had filed grievances against him. He told her that the grievances went

nowhere because "I am the sheriff. I am god," or words to that effect. The Sheriff told her that the buck stopped with him.

Bland could not take the Sheriff's comments and touching any longer and she went home and cried. The next day she went to her parents' home and told her father and mother what had happened to her. On Monday morning, her mother and she went to the Sheriff's department to drop off her work related property there. Bland never returned to the Sheriff's office (Exhibit 3).

Several other woman have also reported sexual harassment by the Sheriff.

III. PROCEDURAL HISTORY

King timely filed a charge of discrimination with the Equal Employment Opportunity Commission and the Virginia Counsel on Human Rights; received a notice of right to sue dated June 8, 2005; and filed a complaint within 90 days of receipt of the notice of right to sue on August 16, 2005.

IV. ARGUMENT

The determination whether class certification is appropriate should be made on the pleadings in light of the procedural requirements of Rule 23 of the Federal Rules of Civil Procedure. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974). Thus, the only issue before the Court is whether the requirements of Rule 23 have been met. Maywalt v.

Parker & Parsley Petroleum Co., 147 F.R.D. 51, 54 (S.D.N.Y. 1993).

Rule 23 should be given a liberal construction consistent with its purpose of affording class action relief. In re A.H. Robins, 880 F.2d 709, 739 (4th Cir. 1989) *cert. denied*, 493 U.S. 959, 107 L.Ed.2d 362, 110 S.Ct. (1989); Black v. Rhone-Poulenc, Inc., 173 F.R.D. 156, 161 n.5 (S.D. W.Va. 1996) (noting the "liberal interpretation accorded Rule 23 in this circuit"); Chisholm v. TranSouth Fin. Corp., 194 F.R.D. 538, 555 (E.D. Va. 2000). In addition, when considering a class certification motion, allegations made in the complaint must be taken as true. Eisen, 417 U.S. at 177-178; In re Southeast Hotel Properties Limited Partnership Investor Litig., 151 F.R.D. 597, 601 (W.D.N.C. 1993). As discussed below, this case easily meets the requirements of Rule 23 and should accordingly proceed as a class action.

A. The Proposed Class Meets the Requirements of Rule 23(a).

In order to proceed as a class action, plaintiff must demonstrate that the prerequisites of Rule 23 of the Federal Rules of Civil procedure are satisfied. Rule 23 requires a showing that

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). In addition the plaintiffs must satisfy one of three criteria set forth in Rule 23(b). Plaintiffs here rely on subsections 23(b)(1)(A) and alternatively 23(b)(3).

1. Rule 23(a)(1): The Members of the Class Are So Numerous That Joinder of All Members Is Impracticable.

A class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). No specified number is needed to satisfy this requirement. Brady v. Thurston Motor Lines, 726 F.2d 136, 145 (4th Cir. 1984), *cert. denied*, 469 U.S. 827 (1984). Moreover, joinder of all members of the class need only be impracticable, not impossible. Christman v. American Cyanamid Company, 92 F.R.D. 441, 451 (N.D.W.Va. 1981).

While impracticability of joinder is not determined by a specific number of claimants, it is well-settled that a class exceeding one-thousand members is too large for the practical participation by each individual member. *See* Lutz v. International Ass'n of Machinists & Aero. Workers, 196 F.R.D. 447, 449 (E.D. Va. 2000); George v. Baltimore City Pub. Schs., 117 F.R.D. 368, 370 (D.Md. 1987) ("Plaintiffs' proposed class exceeds one

thousand members, which clearly makes joinder of all members impracticable.").

Plaintiffs estimate there may be 30 or more persons in the proposed class based upon information received to date. The Fourth Circuit Court of Appeals has concluded that classes such as this one are within the proper range for certification. *See, e.g.*, Brady v. Thurston Motor Lines, 726 F.2d 136 (4th Cir. 1984) (class with 74 persons well within range appropriate for class certification and a much smaller class is also sufficient), *citing* Cypress v. Newport News General & Nonsectarian Hospital Association, 375 F.2d 648, 653 (4th Cir. 1967) (18 class members are sufficient).

In this case, the class members reside in different parts of United States and each class member's individual claim involves an unspecified amount of damages. Given the difficulty of joining all of these individuals to this action, class litigation is clearly justified. In re Southeast Hotel Properties Limited Partnership Investor Litig., 151 F.R.D. 597, 601 (W.D.N.C. 1993); *see also* Allen v. Isaac., 99 F.R.D. 45, 53 (N.D.Ill. 1983) (if all members are not found within the same district, impracticability of joinder is increased); 5 James Wm. Moore, et al., Moore's Federal Practice §23.22[3] at 23-63 to 23-68, 23-71 to 23-72 (3d.Ed 1997). The group offered as a class is too large for the prospect of the active participation of each member to be practical. Moreover, the difficulty and inconvenience inherent in joining all members of the class is apparent. Since the number of people that have an interest in this litigation is substantial, the class action is the most

viable and efficient manner to adjudicate this dispute.

2. Rules 23(a)(2) and 23(b)(3): Questions of Law and Fact Common to the Class Predominate Over Questions Affecting Individual Class Members.

Rule 23(a)(2) requires that there be questions of law or fact common to all members of the class. Allegations of violations of law which impact all class members clearly satisfied this request. *See generally* 4 Herbert B. Newberg & Alba Conte, Newberg on Class Actions §18.25 at 18-81 (3d.Ed 1992) (noting that "common issues such as conspiracy or monopolization have, almost invariably, been held to predominate over individual issues."). 5 Moore's Federal Practice §23.23[5][a].

Here, the core of plaintiff's complaint is that class action defendant has sexually harassed actual and prospective female deputies employed by the Roanoke City Sheriff's Department. At heart of each individual class members' claims are common issues that predominate over any individual question of law or fact; that is whether the Sheriff engaged in inappropriate and offensive sexual comments and touching with respect to existing or prospective female deputies; whether the Sheriff created a hostile and offensive work environment with respect to said female deputies; whether the Sheriff retaliated against deputies who rejected his sexual advances or complained otherwise about sexual

harassment; whether the Sheriff engaged in a pattern and practice of sexual harassment with respect to prospective or actual female deputies; whether the Sheriff's department responded properly to complaints concerning sexual harassment and imposed adequate remedial measures; and whether the victims of sexual harassment suffered damages.

Further, any minor discrepancies or potential dissimilarities in the remedies and amounts of damages sought by members of the class do not prohibit a class action where the complaint established a common course of conduct giving rise to the legal rights sought to be enforced by the class. Chisolm v. Transouth Fin. Corp., 184 F.R.D. 556, 561 (E.D. Va. 1999). Resolution of the above issues, common to all class members, will determine whether or not defendant can continue his practice of sexually harassing female deputies.

3. Rule 23(a)(3): Class Action Plaintiff's Claims are Typical of those of the Class.

Rules 23 (a)(3) requires that the claims or defenses of the class representatives be typical of the claims or defenses of the class. "The premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff, so go the claims of the class." Broussard v. Meineke Discount Mufflers shops, Inc., 155 F.3d 331, 343 (4th Cir. 1998). Complete identity between the claims constituting each individual action is not required. Here, the similarities between the complaints of the female

deputies as described herein supports a finding that the claims of named plaintiff would be typical of the class members.

Claims are typical when "the legal theories of the class representative [do not] conflict with those of the absent class members." 5 Moore's Federal Practice §23.24[1]. The issue of typicality focuses not on factual details, but whether the claims or defenses applicable to the named plaintiff are of the same type as claims or defenses applicable to the class as a whole. Christman, 92 F.R.D. at 451. Claims or defenses are of the same type---and hence typical---when they arise from a common course of conduct and involve similar legal analysis or theories, as they do there. Id., at 452 n.28; *see also*, Baby Neal for and by Kanter v. Casey, 43 F.3d 48, 57-58 (3rd Cir. 1994) (noting that "typicality entails an inquiry whether the named plaintiff's individual circumstances are markedly different or ... the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based"); In Re Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 291 (2nd Cir. 1992).

This requirement is further satisfied where the representatives' claims consider the same legal theories and require substantially the same proofs as required of the other members of the class. Bruce v. Christman, 113 F.R.D. 554, 558 (S.D.N.Y. 1986). Since all of the members of class will benefit by class action plaintiff's success on the merits of this case, the class action is proper.

4. Rule 23(a)(4): The Named Plaintiffs and Plaintiffs' Counsel Will Fairly and Adequately Protect the Interests of the Class.

Rule 23(a)(4) requires that the representative parties fairly and adequately protect the interests of the class. When assessing the class representative's ability to adequately represent the interests of the class, the Court must consider the abilities of both the attorneys who represent the class representatives and the representatives themselves. Christman, 92 F.R.D. at 452. Adequacy of representation is measured by two standards: (1) plaintiff's counsel must be qualified, experienced and generally able to conduct the litigation, and (2) the class members must not have interests antagonistic to one another. Lutz v. International Ass'n of Machinists & Aero. Workers, 196 F.R.D. 447 (E.D. Va. 2000).

As the Fourth Circuit has recognized, the requirement of a common interest and the typicality requirement "tend to merge" with commonality and typicality "serving as guideposts for determining whether. ...the named plaintiff[s'] claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." Broussard, 155 F.3d at 337 (quoting General Tel. Co v. Falcon, 457 U.S. 147, 157 n.13, 72 L.Ed.2d 740, 102 S.Ct. 2364 (1982)). Moreover, where the plaintiff's claims are typical of a common class, the burden is on the defendant to prove that the representation will be inadequate. In

re Southeast Hotel Properties Limited Partnership Investor Litig., 151 F.R.D. at 601. Here, comparison of the plaintiff's allegations with the allegations of the claims of the three deputies described *supra* supports a finding that plaintiff's claims are similar to the interests of the proposed class in obtaining monetary and injunctive relief for sexual harassment. Therefore, the requirement of adequacy of representation is satisfied. Carpenters Local 899 v. Phoenix Assocs., 152 F.R.D. 518, 521 (S.D. W.Va. 1994).

In the present case, counsel for the class action plaintiffs already represents Lespia King and has conducted substantial investigation and legal research to prepare the complaint. There is a marginal additional burden for counsel to represent the interests of the class members. Counsel is capable and will vigorously pursue the action. Under the circumstances appointment of the undersigned counsel to represent the class is appropriate. Lutz, 196 F.R.D. at 453.

B. The Requirement of FRCP 23(b)(1)(A) Have Been Met.

An action may qualify under Rule 23(b)(1)(A) if inconsistent or various adjudications of the controversy would prejudice the party opposing the class. Rule 23(b)(1)(A) is designed to cover those situations in which a party may be ordered to act in inconsistent ways if individual suits were permitted to proceed.

Rule 23(b)(1)(A) applies in cases "where the party is obligated by law to treat the members of the class alike (a utility acting toward customers; a government imposing a tax), or where the party must treat all alike as a matter of practical necessity (a riparian owner using water as against downriver owners." Amchem Prods. v. Windsor, 521 U.S. 591, 614, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (quoting Benjamin Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure, 81 Harv. L. Rev. 356, 375-400 (1967). Courts have upheld certification where the plaintiffs allege that a company uniformly assessed an illegal charge to its customers. Zachery v. Chase Manhattan Bank, 52 F.R.D. 532, 534 (S.D.N.Y. 1971) (permitting (b)(1)(A) certification because the finance charge exacted by defendant bank is either legal or it is illegal as to all customers).

Here, inconsistent and varying adjudications could result in incompatible standards of conduct for the Sheriff as such adjudications could theoretically leave uncertainty as to whether the Sheriff may maintain a hostile and offensive work environment with respect to female deputies. Separate actions would create a risk of "inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class" and thus support certification under 23(b)(1)(A). Carpenters Local 899 v. Phoenix Assocs., 152 F.R.D. 518, 521 (S.D. W.Va. 1994).

Resolution of the factual and legal questions common to class members would involve the risk of

varying and contradictory decisions on similar factual records. In a case similarly involving a central question, the Fourth Circuit has held that such as a situation "unquestionably" qualifies under (b)(1)(A). In re A. H. Robins Co., 880 F.2d 709, 748 (4th Cir. 1989), *cert. denied*, 493 U.S. 959, 107 L.Ed.2d 362, 110 S.Ct. 376, (1989); *see also* Lutz v. International Ass'n of Machinists & Aero. Workers, 196 F.R.D. 447 (E.D. Va. 2000) (granting certification for "issues of nationwide consequences" where "without class certification, individual litigation of this issue is fraught with the risk of inconsistent or incompatible standards of conduct for [defendants] with respect to the annual renewal requirement.").

Other courts agree. For example, in Hernandez v. Motor Vessel Skyward, 61 F.R.D. 558 (S.D. Fla. 1973), *aff'd mem.*, 507 F.2d 1278 (5th Cir. 1975), the court certified an action arising from the food poisoning of ship passengers, citing the risk of inconsistent adjudications. The court noted that the defendant could be sued in sequential suits until it was held liable. Subsequent plaintiffs could then make offensive use of the adverse judgment by arguing that the defendant was collaterally estopped from denying liability. The court held that this created a risk of inconsistent adjudications, Id. Other courts have cited Hernandez in support of decisions to certify class actions under Rule 23(b)(1)(A). *See, e.g.*, In re Bendectin Prod. Liab. Litig., 102 F.R.D. 239 (S.D. Ohio 1984) (litigation arising from the use of a drug that allegedly caused birth defects), *mandamus* granted 749 F.2d 300 (6th Cir. 1984); Coburn v. 4-R Corp., 77 F.R.D. 43 (E.D.

Ky. 1977) (litigations arising out of a fire at a supper club); Union Light, Heat & Power Co. v. United States Dist. Court, 588 F.2d 543 (6th Cir. 1978), *cert. dismissed* 443 U.S. 913, 99 S.Ct. 3103, 61 L.Ed. 877 (1979).

It is clear that this action qualifies under Rule 23(b)(1)(A).

C. Alternatively, Plaintiffs' Claims Qualify for Certification Under Rule 23(b)(3).

Rule 23(b)(3) provides that, in order to maintain a class action, a party must demonstrate that common questions of fact or law predominate over individual issues and that a class action is the superior method for maintaining the suit. Fed. R. Civ. P. 23(b)(3). As set forth above, the analysis on the issue of predominance overlaps with the issue of commonality under Rule 23(a).

The "predominance" inquiry focuses on the number and significance of common questions as opposed to individual issues. *See generally,* 5 Moore's Federal Practice §§23.46[2][a] at 23-208 (noting that courts generally find predominance where individual proof of damages exist, but to not predominate over questions of liability).

The requirements for certification under Rule 23(b)(3) are met because the questions of law or fact common to the members of the class predominate over many questions affecting only individual members and because the class action is superior to

other available methods for fairly and efficiently adjudicating this case. The primary question common to the class is whether the Sheriff sexually harassed female deputies. This question, including the identified sub-issues raised by this question, is so central to the case that it predominates over any individual issues among the members of the class. Individual suits in the case at bar are impracticable because each suit would require present and former female deputies to testify concerning the sexual harassment each has experienced or witnessed for the purpose of determining whether the Sheriff engaged in the pattern and practice of sexual harassment; had knowledge of a hostile and offensive work environment; and imposed adequate remedial measures as a result of knowledge or complaints of sexual harassment.

Rule 23(b)(3) does not require that the common question or questions be dispositive of the entire case, and courts "generally find...predominance requirement satisfied when the issue of liability is common to the class." In re Consumers Power Company Securities Litigation, 105 F.R.D. 583, 607 (E.D. Mich. 1985). Nor do differences in individual damages prevent certification under Rule 23(b)(3). Id. ("When important liability issues are present, the existence of secondary, individual issues should not defeat class certification"); Markham v. White, 171 F.R.D. 217, 224 (N.D. Ill. 1997). In Sterling v. Velsicol Chemical Corporation, 855 F.2d 1188 (6th Cir. 1988), the Court made clear the appropriateness of Rule 23(b)(3) certification in cases involving common

liability issues, even where individualized damages determinations number in the thousands:

> No matter how individualized the issue of damages may be, these issues may be reserved for individual treatment with the question of liability tried as a class action. Consequently, the mere fact that questions peculiar to each individual member of the class remain after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible.

Id. at 1197.

The final element under Rule 23(b)(3) requires the party seeking class certification to demonstrate that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). Certification of the proposed class will satisfy this final prong. Class certification will promote judicial economy by limiting duplicative litigation, and plaintiffs will ensure uniform results for similarly situated parties. Subdivision (b)(3) lists four factors that the court should consider in considering the superiority issue:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or

> against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

A review of the factors listed above reveals that a class action is the superior method of adjudicating this controversy. There are potentially 30 or more class members. As is the case with the "small investor" in securities class action litigation, it would be extremely costly for each individual to proceed against the defendant. *See*, Trief v. Dun & Bradstreet Corp., 144 F.R.D. 193, 200 (S.D.N.Y. 1992). It would seem desirable, in light of the number of potential claimants, to concentrate this action in this forum in order to prevent the duplication of effort and possible inconsistent results.

If certified under Rule 23(b)(3), plaintiffs would propose to provide any opt out notice *via* e-mail to all former and present female deputies at the Sheriff's office. The office will have records of present and former female deputies employed during the Sheriff's tenure, it will be possible to identify and mail opt out notices to all present and former female deputies. Notice by mail or email is therefore reasonably calculated to apprise the interested parties of the pendency of the action. Eisen, 417 U.S. at 173-75.

D. If Subject to Certification under Rule 23(b)(1) and (b)(3), the Class Should be Certified under Rule 23(b)(1).

As outlined above, the class qualifies under both (b)(1) and (b)(3). In such a situation, the rule applied in the Fourth Circuit is that certification is to be made solely under Rule 23(b)(1). In re A. H. Robins Co., 880 F.2d 709, 740 (4th Cir. 1989), *cert. denied*, 493 U.S. 959, 107 L.Ed.2d 362, 110 S.Ct. 376 (1989) (citing 7A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure: Civil 2d §1772, 425 (2d.Ed. 1986)); *see also*, 3B Moore's Federal Practice, §23.31[3], p. 236 (1987 ed.); Robertson v. National Basketball Ass'n., 556 F.2d 82, 685 (2nd Cir. 1977); Green v. Occidental Petroleum Corp., 541 F.2d 1335, 1340 (9th Cir. 1976); Meyer v. Citizens & Southern Nat'l Bank. 106 F.R.D. 356, 363 (D.Ga. 1985).

The rationale for such decision, as relied upon by the courts, is stated by Moore:

> If an action can be maintained under (b)(1) and/or (b)(2), and also under (b)(3), the court should order that the suit be maintained as a class action under (b)(1) and/or (b)(2), rather than under (b)(3), so that the judgment will have *res judicata* effect as to all the class (since no member has the right to opt in a (b)(1) suit), thereby furthering policy underlying (b)(1) and (b)(2) class suits.

3B Moore's Federal Practice, para. 23.31[3], pp. 236-237 (2d.Ed. 1987).

E. The Class Sought To Be Certified Is Appropriate.

The present motion seeks certification of a class that generally consists of present and former female deputies who have been sexually harassed by the sheriff. The class is defined as precisely as possible to include these individuals and to permit the Court to determine whether or not an individual is a member of the class. As such, the class sought to be certified is appropriate in these circumstances.

V. CONCLUSION

For the reasons stated above, Class Action plaintiff respectfully requests the Court to:

(1) grant certification to the class of all persons identified in the complaint;

(2) appoint Lespia J. King as class representative; and

(3) designate Terry N. Grimes, Esquire, P.C., as counsel representing the class.

Respectfully Submitted,

LESPIA J. KING

By /s/ Terry N. Grimes
Of Counsel

Terry N. Grimes, Esquire (VSB#24127)
FRANKLIN COMMONS
320 Elm Avenue, SW
Roanoke, Virginia 24016-4001
(540) 982-3711/(540) 345-6572 *Facsimile*
Counsel for Plaintiff

DECLARATION OF JENNIFER DONOVAN

I, Jennifer Donovan, states and affirm as follows:

(1) My name is Jennifer Donovan. I worked as the public information officer for Sheriff McMillan from approximately January through October 2002 when I resigned because of sexual harassment from the Sheriff and a hostile work environment.

(2) The problem with Sheriff McMillan began during my job interview. During the interview the Sheriff kept the door closed, and the interview lasted several hours and did not finish until 6:00 p.m. During the interview the Sheriff made several odd comments. For example, the Sheriff stated that the public information officer was like his mistress. He also stated that we would become best friends, and that we would be closer than spouses. He also stated that lots of people would talk about how close our relationship would become. He also inquired concerning my personal life and asked if my husband was the jealous type. Despite some reservations, I took the job. I was young at the time having graduated from college in 2000.

(3) After my employment began the Sheriff frequently made offensive sexual remarks and touched me in a way that made me uncomfortable. For example, many times when I spoke with the Sheriff in his office, he patted his thigh as if to invite me to sit on his lap. He also stated that there was

quite a bit of competition for my job, and that he did not hire one girl in particular even though she had bigger tits than I did. I believe the Sheriff made this comment in April 2002 when we were at a conference in Richmond.

(4) On another occasion in September 2002, I believe that we were at a conference in Virginia Beach when the Sheriff commented on the "pretty girls" in the area, or words to that effect. On another occasion, the Sheriff discussed in some detail the fact that his son was being fitted for an athletic cup and made reference to penis size.

(5) The Sheriff also touched me in ways that made me feel uncomfortable. On one occasion in particular, the Sheriff put his hand on my lower back. When I complained to him, he told me that I was being unreasonable. After I complained, the Sheriff became increasingly distant toward me. He began planning meetings without me and criticized my performance. The Sheriff also frequently touched my arm when speaking with me, and on one occasion in particular, he touched my upper arm in a way that made my skin crawl because his fingers brushed my left breast as he held my arm.

(6) The work environment became increasingly hostile. On or about September 26, 2002, the Sheriff stated that he was not "comfortable with me" or words to that effect. He also stated that he "may not keep me," or words to that effect. I resigned shortly thereafter because of the harassment and hostile working environment.

I declare under penalty of perjury that the foregoing statement is true and accurate to the best of my knowledge, information and belief.

[9/1/05]	/s/ Jennifer C. Donovan
Date	Jennifer Donovan

DECLARATION OF KRISTIN N. DARNELL

I, Kristin N. Darnell, state and affirm as follows:

(1) My name is Kristin N. Darnell. I worked for Sheriff McMillan on two occasions from January 2001 until August 2002 when I resigned because of Sheriff McMillan's sexual comments and touching.

(2) I first applied with the Sheriff in December 2000 and was hired to work in the jail beginning January 2001. I was 18 years old at the time and had just graduated from high school several months earlier. During my interview the Sheriff told me that I was among the first 18-year-olds he had hired. He told me that he was a very "touchy, feely person," and that if I "enjoyed that," maybe we could "end up having sex," or words to that effect. The comments made me uncomfortable, but I took the job because I was just out of high school and needed a good-paying job. During the approximately four months I worked for the Sheriff the first time, he hugged me frequently and patted me on the buttocks. He also told me that I was very pretty; that I would make someone very happy someday; and that he wished that "it were me," or words to that effect. I left the Sheriff's office in April 2001 and moved to Florida to go to school and into the reserves.

(3) I returned to Roanoke in January 2002 and spoke with the Sheriff about getting my job back. The Sheriff told me that I was very special,

and that he did not "do that" for a lot of people. He made it clear that if he had me back, he would be doing me a favor. I took the job despite my reservations.

(4) The Sheriff harassed me frequently thereafter and found most any excuse to get me into his office. On one occasion he fussed at me for not wearing a gun in public (I was not certified to carry a gun at the time). After the Sheriff fussed at me for not wearing a gun in public, he told me that there is "something you can do to make it up; come here and give me a hug." He also told me that I could "sleep with him to make it up," or words to that effect.

(5) After that I could not take it any more. I continued to work for the Sheriff while trying to find some way out of the office and find other work. The Sheriff continued to harass me. He made comments to me and hugged me or patted me on the buttocks. He also asked me about my relationships with men and told me, "you are not allow to have a boyfriend," or words to that effect. I left the Sheriff's office for the last time in August 2002.

I declare under penalty of perjury that the foregoing statement is true and accurate to the best of my knowledge, information and belief.

[8-19-05]	/s/ K Darnell
Date	Kristin N. Darnell

DECLARATION OF MALINDA L. BLAND

I, Malinda L. Bland, state and affirm as follows:

(1) My name is Malinda L. Bland. I worked for Sheriff McMillan for about a week in August 2004. I quit my job because of Sheriff's McMillan's highly offensive sexual comments and touching.

(2) The problem with Sheriff McMillan began during my interview with him. He interviewed me in his office one day behind a closed door. He made comments to me such as, "your eye are so beautiful," or words to that effect. As the interview progressed, he inched his chair close to mine. He put his hand on my leg and stated, "I'm just friendly," or words to that effect. He told me that he knew that my mother had voted for Octavia Johnson (I do not know how the sheriff knew this), and he said something like, "you better know---the jail is all about politics---you have to vote for me," or words to that effect. He also told me that I had to have Lasix surgery on my eyes, which I could not afford, and he had me sign some document.

(3) At the time I interviewed with the Sheriff, I was working for Carilion Roanoke Memorial Hospital. The Sheriff started me at $33,000, which was a substantial pay increase, and which I believe was a higher starting salary than that paid to most new deputies.

(4) After my employment began, the Sheriff found a great many reasons to call me into his office. When I went to the office as requested, the Sheriff would grab my buttocks or the side of my body or pull me unto his lap. The Sheriff also told me that he liked big breasts, and he told me that I had a "nice butt," or words to that effect. The Sheriff's actions made me feel terribly uncomfortable.

(5) On one occasion, the Sheriff walked me to the locker area and asked me about my money situation and stated, "I want you to know that I take care of my girls. You're not going to have to want for anything," or words to that effect. He also said, "I've got money. I'll take care of you," or words to that effect. As he talked, he took a $100 dollar bill from a roll of bills and slid the bill into the pocket of my pants. The Sheriff said something about providing money to me "as long as you will come into my office and let me feel you up from time to time," or words to that effect. We then proceeded to the locker area, and we later went to my assigned duty in the courthouse.

(6) That evening the Sheriff called me to his office and told me to have a seat. The Sheriff told me that one of the judges has stated that I had prostituted myself to him in the courthouse that day, and that the judge did not want me to be in his court room. At some point during this conversation, the Sheriff reached toward me and tightened my belt.

(7) The Sheriff also told me at one point that there had been girls in the past that had filed

grievances against him. He told me that the grievances went nowhere because "I am the sheriff. I am god," or words to that effect. The Sheriff told me that the buck stopped with him.

(8) I could not take the Sheriff's comments and touching any longer, and I went home and cried. The next day I went to my parents' home and told my father and mother what had happened to me. On Monday morning, my mother and I went to the Sheriff's department to drop off my work related property there. I never went back to the Sheriff's office.

I declare under penalty of perjury that the foregoing statement is true and accurate to the best of my knowledge, information and belief.

[8-19-05]	/s/ Malinda Bland
Date	Malinda L. Bland

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

LESPIA J. KING	)
	)
Plaintiff,	)
	)Civil Case
v.	)No. _____
	)
GEORGE M. McMILLAN,	)
SHERIFF, ROANOKE CITY	)
SHERIFF'S OFFICE,	)
Serve: George M. McMillan, Sheriff	)
340 Campbell Avenue, SW	)
Roanoke, Virginia 24016	)
(City of Roanoke)	)
	)
Defendant.	)

[Entered: August 16, 2005]

COMPLAINT

Plaintiff Lespia J. King moves for judgment against defendant George M. McMillan, Sheriff, Roanoke City Sheriff's Office ("Sheriff"), and as grounds therefore states as follows:

(1) This is suit for gender discrimination and sexual harassment and constructive discharge and assault and battery authorized and instituted pursuant to Title VII of the Civil Right Act of 1964,

42 U.S.C. §§2000e, *et seq.* and the common law of Virginia.

(2) This Court has jurisdiction pursuant to 42 U.S.C. §2000e-5(f) and 28 U.S.C. §1343(4).

(3) Plaintiff timely filed her charge with the Equal Employment Opportunity Commission and the Virginia Council on Human Rights; received a notice of right to sue dated June 8, 2005; and files this action within 90 days of receipt of the notice of right to sue.

(4) The plaintiff is a female and resident of the City of Roanoke, Virginia.

(5) On information and belief, the Sheriff is a constitutional official duly elected pursuant to the law of the Commonwealth of Virginia. At all times material hereto, the Sheriff employs more than 200 persons.

(6) Plaintiff went to work for Sheriff George M. McMillan and the Roanoke City Sheriff's Office in August 2000 as a deputy in the Roanoke City Jail. From about January 2003 until she resigned March 2004, Sheriff McMillan sexually harassed plaintiff and other female employees and permitted a hostile and offensive work environment to exist which resulted in plaintiff's resignation in March 2004.

(7) For example, shortly after plaintiff began work, while at the gun range the Sheriff insisted on "helping" plaintiff put a gun belt on her

waist, touching her waist during the process and causing plaintiff to feel uncomfortable.

(8) Thereafter, when Sheriff McMillan encountered plaintiff at work, he on several occasions embraced her and pulled her toward him. As he did so, his hands slid toward her buttocks and lingered there until she pulled away. This unwanted touching occurred several times a year during plaintiff's employment.

(9) On one occasion in January 2003 plaintiff met with Sheriff McMillan to request a transfer from one shift to another. Plaintiff had heard that the Sheriff was "hands on" with female employees and therefore dressed conservatively. The Sheriff closed the door to his office and moved his chair next to plaintiff's and kept plaintiff in his office for nearly an hour while the Sheriff questioned plaintiff about her personal life, particularly about dating another employee. The Sheriff talked with plaintiff about her "future" and told her "you're going to have to make a choice, G--- [the other employee] or me." The Sheriff also told plaintiff that she was a very attractive young woman, "very special," and that he liked her hair. Toward the end of the conversation, the Sheriff asked plaintiff to sit on his lap. She protested, and at the end of the meeting, the Sheriff stated that he wanted a kiss. Plaintiff left the office feeling humiliated and vowed that she would attempt to limit her contact with the Sheriff to the extent possible.

(10) On another occasion in October 2003, plaintiff attended a Western Regional Jail

Association dinner at the Clarion Hotel in Roanoke. Sheriff McMillan and other deputies were present. When plaintiff greeted Sheriff McMillan, he wanted to give plaintiff a hug. When she attempted to step away, Sheriff McMillan continued to hold on to her hip and buttocks. Sheriff McMillan stated, "I'm going to hold on to you until G--- [the other employee] notices and gets jealous," or words to that effect. Plaintiff tried to get away, but the Sheriff held on tightly and made other comments about the male deputies. Plaintiff eventually broke away from the Sheriff.

(11) The next day at work, a captain in the Sheriff's office pulled plaintiff aside and told her that Sheriff McMillan had been a little intoxicated at the function and was "just feeling very good," or words to that effect. Plaintiff was humiliated by the incident and heard several comments from other deputies about the Sheriff's behavior with plaintiff and other female deputies.

(12) On March 10, 2004, plaintiff was working midnight shift when Sheriff McMillan stayed late at work one evening. Plaintiff could not endure the harassment and hostile environment any longer and had placed an application with another employer. Sheriff McMillan apparently learned that plaintiff planned to leave when a background investigator contacted the Sheriff's office. At about 10:00 p.m. that evening, the Sheriff asked to speak with plaintiff in the jail conference room. Sheriff McMillan told plaintiff she had a "wonderful career" ahead of her in his department if she would just "put her time in" or words to that effect. As the

conversation continued, Sheriff McMillan told plaintiff that if she "broke up" with her boyfriend, then she would be able to "go places" with the Sheriff's office. The Sheriff tried to convince plaintiff to reconsider resigning and told her she was a good worker and very intelligent; stated repeatedly that plaintiff was "a very attractive young woman," or words to that effect; told her how good her legs looked when she had worn a skirt at the Western Regional Jail Association dinner in October; told her that he liked her hair; and stated that if he "were a few years younger, you would be dating me instead of G---," or words to that effect. Plaintiff tried to deflect the conversation and reminded the Sheriff that he was married. Toward the end of the conversation, the Sheriff asked for a hug. As plaintiff stood up, the Sheriff pulled her down unto his lap to give her a hug. The Sheriff then told plaintiff that he wanted a kiss. When plaintiff gave the Sheriff a peck on the cheek as requested, he told her that "wasn't a real kiss," or words to that effect. Plaintiff fled the conference room and hid in a bathroom until the Sheriff was gone and cried. Plaintiff turned in her two-week notice on March 19, 2004.

(13) Plaintiff thereafter filed a charge of discrimination with the Equal Employment Opportunity Commission, which documentation contains further details.

(14) Plaintiff resigned her employment as a result of the continuing pattern of sexual harassment and the maintenance of a hostile and offensive work environment.

COUNT I: CLAIM FOR SEX DISCRIMINATION AND SEXUAL HARASSMENT AND CONSTRUCTIVE DISCHARGE

(15) Plaintiff incorporates by reference herein the preceding paragraphs of this complaint.

(16) At all times material hereto, defendant had an obligation to maintain a work environment that was not charged with sexual harassment and discrimination and hostile to plaintiff and other women.

(17) Defendant violated federal law by permitting a work environment to exist that was sexually charged and hostile and offensive to plaintiff and other women and by constructively discharging plaintiff.

(18) As a direct and proximate result of defendant's actions, plaintiff has suffered and will continue to suffer pecuniary loss, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other non-pecuniary loss.

(19) At all times material hereto, defendant engaged in a discriminatory practice or practices with malice or reckless indifference to the federally protected rights of the plaintiff so as to support an award of liquidated and/or punitive damages.

(20) The above-described acts by the defendant constitute sexual harassment and sex discrimination and constructive discharge in

violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et. seq*

COUNT II: CLAIM FOR ASSAULT AND BATTERY

(21) Plaintiff incorporates by reference herein the preceding paragraphs of this complaint.

(22) Defendant's inappropriate and unwanted touching and related conduct constitutes assault and battery in violation of Virginia common law.

(23) As a direct and proximate result of defendant's conduct, plaintiff has suffered and will continue to suffer pecuniary loss, pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other non-pecuniary loss.

(24) Further, defendant acted with actual malice toward plaintiff or with reckless disregard of the protected rights of the plaintiff so as to support an award of punitive damages.

WHEREFORE, Plaintiff Lespia J. King prays for judgment against George M. McMillan, Sheriff, Roanoke City Sheriff's Office and for equitable relief, compensatory, liquidated and punitive damages, together with prejudgment interest from the date of termination of plaintiff's employment, and for costs and attorney's fees, and for such other and further relief as may be just and equitable.

Trial by jury is demanded.

Respectfully Submitted,

LESPIA J. KING

By /s/ Terry N. Grimes
Of Counsel

Terry N. Grimes, Esquire (VSB#24127)
FRANKLIN COMMONS
320 Elm Avenue, SW
Roanoke, Virginia 24016-4001
(540) 982-3711
(540) 345-6572 *Facsimile*
Counsel for Plaintiff

U.S. Department of Justice
Civil Rights Division

NOTICE OF RIGHT TO SUE
WITHIN 90 DAYS

CERTIFIED MAIL
5062 6792

950 Pennsylvania Avenue, N.W.
Karen Ferguson, EMP, PHB,
Room 4239
Washington, DC 20530

Ms. Lespia J. King
c/o Terry N. Grimes, Esquire
Law Office of Terry N. Grimes
Attorney at Law
320 Elm Ave., S.W.
Roanoke, VA 24016-4001

June 8, 2005

Re: EEOC Charge Against Roanoke City Sheriff's Office, et al.
No. 122200500152

Dear Ms. King:

Because you filed the above charge with the Equal Employment Opportunity Commission, and more than 180 days have elapsed since the date the Commission assumed jurisdiction over the charge, and no suit based thereon has been filed by this Department, and because you through your attorney have specifically requested this Notice, you are hereby notified that you have the right to institute a civil action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, et seq., against the above-named respondent.

If you choose to commence a civil action, such suit must be filed in the appropriate Court within 90 days of your receipt of this Notice.

This Notice should not be taken to mean that the Department of Justice has made a judgment as to whether or not your case is meritorious.

Sincerely,

R. Alexander Acosta
Assistant Attorney General
Civil Rights Division

by /s/ Karen L. Ferguson

Karen L. Ferguson
Supervisory Civil Rights Analyst
Employment Litigation Section

cc: Norfolk Area Office, EEOC
Roanoke City Sheriff's Office, et al.

CHARGE OF DISCRIMINATION

Charge No. 122-2005-00152

This form is affected by the Privacy Act of 1974; *see* Privacy Act Statement before completing this form.

Agency
__FEPA
X EEOC

Virginia Council on Human Rights and EEOC
State or Local Agency, if any

NAME (Indicate Mr., Ms., Mrs.)
Lespia J. King, SSN: 225-27-7096
(Caucasian)

HOME TELEPHONE & AREA CODE
540.345.4888

STREET ADDRESS
3701 Southway Drive, SW, #99

CITY, STATE & ZIP CODE
Roanoke, Virginia 24014

BIRTHDATE
05.05.78

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO

DISCRIMINATIED AGAINST ME (if more than one list below).

NAME
Roanoke City Sheriff's Office / Sheriff George M. McMillan

NO. OF EMPLOYEES, MEMBERS
200 + (est.)

TELEPHONE
540.853.1717

STREET ADDRESS
324 Campbell Avenue

CITY, STATE & ZIP CODE
Roanoke, Virginia 24016

COUNTY

CAUSE OF DISCRIMINATION BASE ON (check appropriate box(es))

__RACE _X_ SEX __NATIONAL ORIGIN __AGE _X_ OTHER: SEXUAL HARASSMENT __COLOR __RELIGION __RETALIATION __DISABILITY

DATE DISCRIMINATION TOOK PLACE: Earliest: 1/03 (est.) Latest: 4/04 (constructive discharge)

_X_ CONTINUING ACTION

THE PARTICULARS ARE (If additional space is needed, attach extra sheet(s))

I went to work for the Roanoke City Sheriff's Office/Sheriff George M. McMillan in August 2000 as a deputy in the Roanoke City Jail. Since about January 2003, I have been sexually harassed by the sheriff and others which created an extremely hostile and offensive work environment and resulted in my constructive discharge in March 2004. (Continued)

X I want this charge filed with both the EEOC and the State or local Agency, if any.

I will advise the agencies if I change my address or telephone number and cooperate fully with them in the processing of my charge in accordance with their procedures. I declare under penalty of perjury that the foregoing is true and correct.

Date: 10-12-04

Charging Party (Signature) /s/ Lespia J. King

Notary (When necessary for State and Local Requirements)

/s/ Karen L. Poff 10/12/04

I swear and affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT
/s/ Lespia J. King

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (day, month, and year):
/s/ Karen L. Poff 10/12/04

MY COMMISSION EXPIRES: 4/30/08

For example in January 2003, I had a meeting with Sheriff McMillian to request a transfer from one shift to another. I deliberately wore an oversized blue turtleneck sweater to wear to the meeting to look "unfeminine" because I knew from both rumor and experience that the sheriff was very "hands on" with female employees. When the sheriff escorted me into his office, the door was closed. He did not sit as his desk but instead move to the chair next to mine. I was in the sheriff's office for nearly an hour. The sheriff asked me several questions about my personal life, particularly about dating another employee. The sheriff talked about my future at the department and told me, "[y]ou're going to have to make a choice, Goens [the other employee] or me." The sheriff also state that I was a very attractive young woman, "very special," and that he like the way I was allowing my hair to grow long again. Toward the end of the conversation, the sheriff wanted me to sit on his lap. I protested, attempting to use his injured foot and crutches as an excuse to keep my distance, but he insisted. At the very end, as I was preparing to leave, the sheriff also wanted a kiss. I attempted to give him a quick peck on the check, but he turned his head to face me, and the

kiss landed on his lips. I left the office, vowing that I would not go into his office again and ask him for anything. I kept that promise to myself and attempted to avoid his office until I resigned approximately one and one-half years later due to the harassment and hostile work environment.

On another occasion in October 2003, I attended a Western Regional Jail Association dinner at the Clarion Hotel in Roanoke. Several other employees from the sheriff's department were there, as well as Sheriff McMillian. When I greeted Sheriff McMillian, he wanted to give me a hug. When I attempted to step away, he continued to hold on to my hip, with some fingers splaying around my buttocks. He stated, "I'm going to hold on to you until Goens notices and gets jealous." Sergeant Goens, my boyfriend was at one corner of the room, and the sheriff and I were near the middle of the room. I tried to talk my way out of the sheriff's grasp but he continued to hold on tightly. As Goens made his way about the room, Sheriff McMillian repeated his statement, and as I tried to get away, I stated, "he's not the jealous type," and "see, he isn't even looking in our direction." I was eventually able to break away from the sheriff to talk to someone else. Captain Russell, who was my shift lieutenant at the time, stood about three feet away the entire time. When I returned to work, Captain Russell pulled me aside and told me that Sheriff McMillian was a little intoxicated at the function and was just "feeling very good." Other people at work, including deputies who had not attended, apparently saw or heard about the incident. I heard several comments about how I got struck by "the grope-a-lope," a nickname the sheriff

has earned through hugs that cross into "copping a feel."

The straw that broke the camels back occurred on March 10, 2004. I was working midnight shift at the time. Sheriff McMillian stayed late at work one evening. I could not take the harassment and hostile environment any longer and had put in an application with a neighboring county's sheriff's office. Sheriff McMillian apparently learned that I was leaving when the background investigator contacted the office to check into my history. At around 10:00 p.m., the sheriff asked to speak with me about the matter in the jail conference room. I went into the room with the sheriff, and the door was closed. The sheriff told me that I had a wonderful career ahead of me in his department if I would just "put my time in." I mentioned several other female deputies who had less time on shift work and had been transferred. The sheriff then told me that if I broke up with my boyfriend, then I would be able to "go places," but that it could take another "two to ten years." The sheriff tried to convince me to reconsider resigning, and he told me that I was a good worker, and very intelligent. The sheriff repeatedly stated, "you are a very attractive young woman," or word to that effect. The sheriff also mentioned how good my legs looked when I had worn a skirt to the Western Regional Jail Association dinner in October, and the sheriff told me that he liked how long my hair had grown. The sheriff stated, "if I were a few years younger, you would be dating me instead of Goens." Sheriff McMillian made that statement at least three times. I tried to deflect the conversation and reminded the

sheriff that he was a married man. Toward the end of the conversation, the sheriff asked for a hug. As I stood up, the sheriff pulled me down to his lap to give me a hug. The sheriff then wanted a kiss. I gave him a peck on the cheek as requested, but the sheriff told me that "wasn't a real kiss," or words to that effect. I had to then give him a peck on the lips so he would let go of me. I got out of the conference room and ran into the bathroom to hide until the sheriff was gone. I cried in there because I was so upset. I turned in my two weeks notice on Friday, March 19th. When I went to the sheriff's office to turn in the letter, his secretary asked me to wait a moment and she would see if the sheriff wanted to talk to me. I refused and left. I worked out my two weeks, and I have not seen Sheriff McMillian since the night of March 10, 2004.

I am not aware that the sheriff has requested any hugs or kisses from any of the male deputies, and I believe that I have been discriminated against because of my sex (female) and sexually harassed in violation of state and federal law to the point that I could no longer work under Sheriff McMillian, and I believe that the department and the sheriff have treated other females similarly, all in violation of state and federal law.

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No. 07-262

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SUPREME COURT, U.S.

In The Supreme Court of the United States

LESPIA KING,

Petitioner,

JENNIFER DONOVAN, MALINDA BLAND, KRISTIN DARNELL, TAMARA SPEIGHT, ERIN BACHINSKY, and ANGELA LINKOUS,

Intervenors,

v.

GEORGE M. MCMILLAN, SHERIFF, and ROANOKE CITY SHERIFF'S OFFICE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether petitioners have presented compelling reasons to grant the petition where the Fourth Circuit's opinion does not conflict with a decision of this Court or a court of appeals and found it unnecessary to address the single-filing rule?

II. Whether petitioners have presented compelling reasons to grant the petition where the district court properly exercised its discretion in denying the motion to intervene and the Fourth Circuit did not hold that Rule 24 requires more than a single intervenor?

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STATEMENT OF THE CASE

This action was preceded by an EEOC charge on October 12, 2004 alleging sexual harassment, a hostile work environment and constructive discharge by plaintiff Lespia King (hereinafter "plaintiff" or "King"). (Pet. App. At 125-131). In that charge, plaintiff stated that she began working for Sheriff McMillan (hereinafter "defendant" or "Sheriff") in August 2000 and that sexual harassment by the Sheriff began in January 2003.[1] (Pet. App. at 127). She complained of his conduct during a meeting with her about a shift transfer in January 2003, during their attendance at a Western Regional Jail Association dinner in October 2003, and during a conversation on March 10, 2004 after she applied for another job. Plaintiff then resigned in March 2004. (Pet. App. at 131). Plaintiff did not bring a class charge or indicate that she was filing on behalf of others and did not give notice in any way that she was pursuing a charge for anyone other than herself. As the district court noted, King "only referred to the experiences of other women in the closing sentence of the charge, stating, 'I believe that the department and the sheriff have treated other females similarly....'" (Pet. App. at 131).

Plaintiff received a right to sue notice on June 8, 2005, and filed this Title VII case on August 16, 2005. Plaintiff alleged that sex discrimination/harassment and a hostile work environment existed from January 2003 until she resigned and was allegedly constructively discharged in March 2004. (Pet. App. at 116). She then made factual allegations concerning limited events after she began

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[1] King continually implies that her EEOC charge alleged a hostile work environment and sexual harassment throughout her tenure with the Sheriff. This is not the case. The EEOC charge states that harassment began in January 2003 and cites to no conduct occurring prior to January 2003.

employment in August 2000 and prior to January 2003. (Pet. App. at 116-17). The complaint filed by plaintiff purports only to be an action by one individual. (Pet. App. at 115-122). Sheriff McMillan answered the suit and denied the allegations.

On September 16, 2005, more than 90 days after the issuance of the right to sue notice, plaintiff filed a motion to certify a class action. (Pet. App. at 77). On October 7, 2005, a motion to intervene pursuant to Rule 24 was filed by Jennifer Donovan, Malinda Bland, Kristin Darnell, Tamara Speight, Erin Bachinsky and Angela Linkous (collectively, the "putative intervenors"). (Pet. App. at 30-31). By order entered October 20, 2005, the district court denied plaintiff's motion to certify a class action. (Pet. App. at 16.) The court found that plaintiff "failed to bring her class action within the statutory 90-day period." (Pet. App. at 20). The court also noted that it appeared that the claims of at least four women were time-barred and that the requirement that class members share questions of law and fact was not met. (Pet. App. at 22). On January 5, 2006, the district court denied the motion to intervene "[b]ecause King's EEOC charge did not forecast a collective action, because the putative plaintiffs' claims are factually dissimilar, and because five of the six putative plaintiffs could not have filed timely charges with the EEOC at the time King filed hers...." (Pet. App. at 10-15).

The Fourth Circuit Court of Appeals affirmed the denial of the motion to intervene finding it unnecessary to decide "whether to join those circuits that apply the single-filing rule to non-class actions because we conclude that the rule would not be properly applied in this case." (Pet. App. at 6). The Fourth Circuit found that the claims by five of the six putative intervenors were barred and that the single filing rule would not apply where there are only two complainants.

(Pet. App. at 6-7). This petition followed the denial of motions for rehearing.

The district court found that the alleged experiences of the plaintiffs "contrast sharply" and present "differing questions of fact and law." (Pet. App. at 14). The declarations of former employees Jennifer Donovan, Kristen Darnell and Malinda Bland and the declarations filed by the Sheriff in opposition to the motion to certify class action and the motion to intervene point out the stark differences in, and the individual nature of, the allegations. For example, Donovan, Darnell and Bland all allege that they were harassed while they were interviewed for employment and went to work for the Sheriff despite the harassment. (Pet. App. at 47, 50, 52). King makes no such allegations.

Donovan was employed from January through October 2002 – a time period that predates the harassment plaintiff alleged in her EEOC charge. Donovan had job performance issues as she could not complete her assignments on time and had others performing her duties for her. She resigned after being told that the Sheriff may not continue to employ her. (Memo in Opp. to Mot. to Certify Class Action, Exhibit 2, ¶2).

Darnell was employed by the Sheriff on two separate occasions. (Pet. App. at 50). Both periods of employment predate the harassment alleged by plaintiff in the EEOC charge. She began employment in December 2000 and resigned in April 2001 when she moved to Florida to be with her mother and to go to school. Despite alleged harassment during her interview and earlier employment, she then returned to employment with the Sheriff in January 2002 and resigned in August 2002. (Pet. App. at 51). During this second period of employment, she had numerous job performance issues. Shortly before she resigned, she received a written reprimand and Major Brubaker was

beginning the process to terminate Darnell. (Memo in Opp. to Mot. to Certify Class Action, Exhibit 3, ¶3) In May 2005, Darnell called the Sheriff and requested a job, yet again, with the Sheriff's office. (Memo in Opp. to Mot. to Certify Class Action, Exhibit 2, ¶5)

Bland claims an employment period of one week in August 2004, months after plaintiff's resignation. (Pet. App. at 52). She alleges that she was paid more money than other deputies. As alleged by Bland, the Sheriff told her that one of the judges stated that she had prostituted herself to him. (Pet. App. at 53). Indeed, on that day, the Sheriff learned that while Bland toured the courthouse and was introduced, she told a local circuit court judge, who was celebrating his birthday, that she liked older men and that this might be his lucky day. (Memo. in Opp. to Mot. To Certify Class Action, Exhibit 4, ¶ 2). Bland did not return to work after this. (Pet. App. at 54).

The other three declarations are from persons who were never employed by the Sheriff. Bachinsky was merely interviewed for a position in January or March 2002 (Pet. App. at 56-57; Supp. Memo in Opp. to Mot. to Certify Class Action, Exhibit 1, ¶3), and Speight and Linkous were employed to work at the jail by Prison Health Services, an independent contractor. (Pet. App. at 55, 59). Linkous worked for Prison Health Services from August 2001 until February 2003, and Speight worked for Prison Health Services from June 2000 until October 2001.

REASONS FOR DENYING THE PETITION

Plaintiff and the putative intervenors (collectively "plaintiffs") have not presented compelling reasons for review by the Court, as required by Rule 10 of the Supreme Court Rules, because this case did not create a conflict among the courts of appeals and does not involve an important question of federal law undecided by this Court or in conflict with a decision of this Court. The case involves only the disallowance of stale claims and the exercise of discretion in denying a motion to intervene under Rule 24 of the Federal Rules of Civil Procedure.

I. The Single-Filing Rule is Irrelevant to this Case.

Plaintiffs urge this Court to adopt the single-filing rule adopted by some courts of appeals and state that "the Fourth Circuit erred in failing to adopt the single-filing rule." (Pet. at 15). The single-filing rule "allows plaintiffs who have not exhausted the administrative requirement of filing with the EEOC to join in a lawsuit with other plaintiffs who have exhausted the requirement, provided that all plaintiffs' claims are substantially similar and that the EEOC charge itself gave notice of the charge's collective nature." *White v. BFI Waste Services, LLC*, 375 F.3d 288, 293 (4th Cir. 2004) (citations omitted). Additionally, an intervenor "must have been able to file a timely charge on the date that the original individual did so." *Bryson v. Fluor Corp.*, 914 F. Supp. 1292, 1296 (W.D.S.C. 1995) (citing *Tolliver*, and *Pandis v. Sikorsky Aircraft Div.*, 431 F. Supp. 793, 798 (D. Conn. 1977)). *See also Movement for Opportunity & Equality v. General Motors Corp.*, 622 F.2d 1235, 1248 (7th Cir. 1980) (only class members who could have filed timely charge when class representative filed can be included).

As other courts of appeals have done, the Fourth Circuit has recognized the single-filing rule in the context of persons seeking to intervene as representatives in a class action. *Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326 (4th Cir. 1983), *cert. denied*, 466 U.S. 951 (1984). In *Lilly*, the court allowed the intervenors to join the class action as representatives with regard to promotion where the claims are "so similar that it can fairly be said that no further conciliatory purpose would be served by filing separate EEOC charges...." *Id.* at 335. It noted that the intervention is not appropriate if "there is a real possibility that one of the claims might be administratively settled while the other can be resolved only in the courts...." *Id.*

More recently, the Fourth Circuit noted that it had not yet adopted, or rejected, the single-filing rule outside the class action context. *White*, 375 F.3d at 293. The court did not have to reach the issue in *White*. Likewise, in this case, the Fourth Circuit did not find it necessary in this case to decide whether or not to adopt the single-filing rule outside the context of class action suits because, even if adopted, the rule could not be properly applied here. Different circuits have developed different tests in order for a person who has not exhausted administrative remedies to piggyback on to a lawsuit of someone who has exhausted administrative remedies. "The most liberal test requires only that the claims of the timely claimant and the piggybacking claimant arise out of the same circumstances and occur within the same general time frame." *Bryson*, 914 F. Supp. at 1296 (citing *Howlett v. Holiday Inns, Inc.*, 49 F.3d 189, 195 (6th Cir.), *cert. denied*, 516 U.S. 943 (1995)). *See also Horton v. Jackson County Bd. Of County Com'rs*, 343 F.3d 897 (7th Cir. 2003)[2]; *Griffin v. Dugger*, 823 F.2d 1476 (11th Cir. 1987), *cert. denied*, 486 U.S. 1005 (1988). "A more

[2] *Horton* includes a discussion as to why the single-filing rule is questionable when applied outside the class-action context, and McMillan concurs with this reasoning.

moderate test requires that the EEOC charge give notice that the discrimination is 'class-wide.'" *Bryson*, 914 F. Supp. at 1296 (citing *Howlett*). "Finally, the strictest test requires the EEOC charge to allege both discrimination against a class and that the claimant purports to represent the class or others similarly situated." *Id.*

Intervenors in the case at hand cannot meet even the most liberal test. Five of the six putative intervenors could not have filed a timely charge on the date the King did. All intervenors except Bland were time-barred. The incidents alleged by the intervenors did not occur within the same general time frame as the incidents alleged by King. Indeed, Bland alleges an incident in August 2004 when King left the Sheriff's office in March 2004.

Certainly, if notice of "class-wide" discrimination or a collective action is required in the EEOC charge, that requirement has not been met. The requirement of filing a charge with the EEOC serves the purpose of putting the employer on notice and allowing an opportunity for conciliation. *Lilly*, 720 F.2d at 335. King's EEOC charge goes on at length about her individual circumstances. Only in her last sentence does she say that "I believe that the department and the sheriff have treated other females similarly...." (Pet. App. at 131). This vague statement of belief is entirely insufficient to put the Sheriff on notice of other claims occurring at various alleged time periods. Moreover, as one court has noted, the single-filing rule makes little sense in the context of only two claims, "in which the rationale of the doctrine is attenuated to the point of nonexistence." *Horton*, 343 F.3d at 900. The same court also stressed the requirement that the cases "arise from the same set of facts rather than merely from facts that resemble each other" otherwise "courts will perforce be excusing the filing of a timely charge in *every* case in which an employee

alleges retaliation for supporting another employee's charge." *Id.* at 901.

In this case, the claims do not arise from the same set of facts and are not similar. Two of the intervenors did not work for the Sheriff, but worked for Prison Health Services. One intervenor never worked for the Sheriff, but was interviewed for a position. None of the intervenors indicate that they were witness to or present when the King incidents allegedly occurred. As the district court stated in its opinion denying class certification, "[t]he experiences of the six women to whom King has directed the court's attention vary dramatically." (Pet. App. at 22).

Plaintiffs have failed to cite to any case in which the single-filing rule was applied to revive long dead claims. Five of the six women seeking to intervene in this case assert claims that could not have been filed with the EEOC when plaintiff filed her EEOC charge.[3] The claims were more than 300 days old when plaintiff filed her charge. These stale charges cannot be refreshed years later through a motion to intervene. The statute of limitations and lack of notice and due process to defendant do not allow new life to be breathed into such claims through a motion to intervene.

With regard to intervenors, this Court looks to whether the statute of limitations has run. In *American Pipe v. Utah*, 414 U.S. 538 (1974), when the district court denied class certification, several putative class members moved to intervene. In that case, although the statute of limitations had run as to the intervenors, this Court held that their claims

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[3] King's EEOC charge was filed on October 12, 2004. Three hundred days before that date is December 17, 2003. Before December 17, 2003, all of the putative plaintiffs, except Bland, left the Sheriff's employment, left employment by Prison Health Services, or had been interviewed and not hired. Bland had not yet been employed for her week of employment in August 2004.

were not time-barred because the filing of the putative class action tolled the statute of limitations with regard to the putative class members. *American Pipe*, 414 U.S. at 552-53. In this case, the statute of limitations expired before the filing of the motion to certify a class so tolling is of no assistance to the intervenors.

In *Harris v. Marsh*, 679 F. Supp. 1204 (E.D.N.C. 1987), *rev'd in part on other grounds*, 914 F.2d 525 (4th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991), in a claim involving the federal government, forty-four plaintiffs tried to intervene in a lawsuit after class certification was denied. In considering the motion to intervene, the court noted with approval that the trial court "held that any claim occurring more than thirty (30) days prior to the initiation of plaintiffs' ... informal administrative class complaint ... was untimely." *Harris*, 679 F. Supp. at 1229 (citing *American Pipe*). *See also Donald v. Edwards*, 705 F.2d 452 (6th Cir. 1982) (named plaintiff may represent only those class members who could have filed a timely charge on the same day – stale claims may not be resurrected) (citations omitted).

Plaintiffs claim that because this Court held that hostile work environment plaintiffs may rely upon behavior outside the statutory time period "so long as an act contributing to that hostile environment takes place within the statutory time period." *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 105 (2002); (Pet. at 16). Plaintiffs then attempt to extend the holding of *Morgan* to conclude that putative intervenors need not have a claim that could be timely asserted when King filed her charge because King alleged a hostile work environment. (Pet. at 16). This reasoning is without any support in case law and would allow an unlimited number of former employees to file claims that should have been asserted long ago to join in a Title VII case as long as the plaintiff filing a charge alleged a

hostile work environment. The single-filing rule as proposed by plaintiffs would then completely eliminate the statutory time requirements in hostile environment cases.

II. There was No Abuse of Discretion with regard to the Finding that Plaintiffs did not Meet the Requirements of Rule 24.

Finally, the putative intervenors cannot meet the requirements for intervention of right or permissive intervention under Rule 24 of the Federal Rules of Civil Procedure. If plaintiff prevails, the putative plaintiffs would not be barred by that decision from asserting their claims and their claims are not factually similar.

Pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, intervention of right is only allowed, upon timely application, when a statute confers such right or "when the applicant claims an interest relating to the ... transaction ... and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest...." Fed. R. Civ. P. 24(a).

As the district court properly found, "there is little or no danger 'that the disposition of the action may as a practical matter impair or impede [the putative intervenors'] abilit[ies] to protect [their] interest[s].'" (Pet. App. 13, n.2). The allegations of the putative intervenors vary substantially from plaintiff's allegations and from each others' allegations. The allegations do not involve a certain policy or the same incident, so there is no danger of a decision that would impair the putative intervenors' ability to bring their own

lawsuits.[4] To accept the argument that a decision in the King case would essentially amount to *stare decisis* in the putative intervenors' claims would be to require all sexual harassment cases involving the same alleged harasser to be multi-plaintiff actions regardless of the allegations. Moreover, the fact that the putative intervenors may be barred by a statute of limitations does not constitute impairment of their interests because they would not be impaired because of any judgment in the underlying case. *See United States v. City of New York*, 198 F.3d 360, 366 (2d Cir. 1999).

With regard to permissive intervention, Rule 24(b) of the Federal Rules of Civil Procedure states that a person may intervene in an action, upon timely application, "when an applicant's claim or defense and the main action have a question of law or fact in common." Additionally, the Rule notes that courts shall consider any delay or prejudice to the parties. Fed. R. Civ. P. 24(b).

Sexual harassment cases and disparate treatment cases, unlike disparate impact cases, turn on individual allegations and fact specific inquiries. Thus, these cases are less likely than disparate impact cases to meet the requirement of common questions of law or fact. See, *e.g.*, *Stastny v. Southern Bell Telephone and Telegraph Co.*, 628 F.2d 267 (4th Cir. 1980); *Talley v. ARINC, Inc.*, 2004 WL 1572650 (D. Md. July 14, 2004); *Carson v. Giant Food, Inc.*, 187 F. Supp. 2d 462, 470 (D. Md. 2002), *aff'd sub nom*, *Skipper v. Giant Food, Inc.*, 68 Fed. Appx. 393 (4th Cir.), *cert. denied*, 540 U.S. 1074 (2003).

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[4] The *Foster v. Gueory* case, extensively relied upon by the putative intervenors, differs from this case in that the claims of the intervenors in *Foster* were "essentially identical" to those of the plaintiff with the exception of union membership. 655 F.2d 1319, 1322 (D.C. Cir. 1981).

In this case, plaintiff alleges gender discrimination, sexual harassment in the form of a hostile work environment, and constructive discharge under circumstances where plaintiff was performing her job adequately. Unlike plaintiff, the putative intervenors attempt to assert claims of harassment in the interview process, constructive discharge under circumstances where they were not performing their jobs adequately, and retaliation. These are not common questions of law and fact. With regard to constructive discharge, specific facts with regard to each person are integral to a determination with regard to the employer's intent. Sporadic, isolated incidents are alleged involving one individual plaintiff or putative intervenor in each incident over a period of years.

It is not alleged that the plaintiff or putative intervenors witnessed the incidents as to the others or that they were all part of the same incident. If the motion to intervene were granted, the trial court would have to explore the individual issues of job performance, the questionable allegations of the putative intervenors that they were harassed during an interview and then accepted employment, the facts surrounding Darnell's decision to return to the office a second time and request a third employment, the circumstances surrounding Bland's inappropriate remarks to a judge, and the individual circumstances surrounding alleged constructive discharges. The claims have little in common with one another, and the district court's denial of the motion to intervene was within its discretion.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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